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Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

IN THE MATTER OF: : Docket No.
: 2012-6 CRB CD 2004-
Distribution of the 2004- : 2009 (PHASE II)
2009 Cable Royalty Funds :
:
:
IN THE MATTER OF: : Docket No.
: 2012-7 CRB SD 1999-
Distribution of the 1999- : 2009 (PHASE II)
2009 Satellite Royalty :
Funds :
:

VOLUME III

Wednesday,
April 15, 2015
Room LM-408
Madison Building
Library of Congress
101 Independence Avenue, S.W.
Washington, D.C.

The above-entitled matter came on for
hearing, pursuant to notice, at 9:09 a.m.

BEFORE:

THE HONORABLE SUZANNE M. BARNETT,
Copyright Royalty Judge
THE HONORABLE JESSE FEDER
Copyright Royalty Judge

THE HONORABLE DAVID R. STRICKLER
Copyright Royalty Judge

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1 Q Did you - were you not concerned about
2 giving a confidential document to Mr. Nilsson?
3 A No, because at the time he was
4 actually soliciting us and we were being
5 solicited and discussing with him, him being
6 counsel of IPG in appellate proceedings. I had
7 already had thorough conversations with him that
8 would clearly be attorney-client privileged and
9 so he was effectively acting as counsel at that
10 point in time.
11 Q In your mind you believed that he
12 would keep anything you gave him confidential?
13 A Yes.
14 Q Because he was an attorney acting in
15 that capacity?
16 A Absolutely.
17 Q When you sent that information to Ms.
18 Berlin did you have any - did you in your own
19 mind believe that she would keep it confidential?
20 A Absolutely.
21 Q Why?
22 A Because the entire point of our

6

1 F-R-O-C-E-E-D-I-N-G-S
2 9:09 a.m.
3 JUDGE BARNETT: Mr. Boydston?
4 MR. BOYDSTON: Thank you, your Honor.
5 REDIRECT EXAMINATION
6 BY MR. BOYDSTON:
7 Q Good morning, Mr. Galaz. Yesterday,
8 when you were cross examined by counsel for the
9 SDC, you were asked questions about Exhibit 247,
10 which was the emails between you and Toby Berlin
11 and also copied on some of them were Michael
12 Nilsson, the attorney that you referenced. Do
13 you recall that?
14 A Yes, I do.
15 Q Now, you had attached a document to
16 one of those emails that's in that exhibit. Do
17 you recall that?
18 A Yes.
19 Q And you had testified that the
20 information, that was confidential. Now, that
21 was provided to Mr. Nilsson, correct?
22 A Correct. He was CC'd.

8

1 conversation was engagement of her as an expert
2 witness and you would certainly expect some level
3 of confidentiality with any sort of engagement of
4 that nature, that person wouldn't take that
5 information and share it with third parties,
6 certainly, your adversaries.
7 MR. BOYDSTON: Your Honor, I forgot to
8 put Mr. Galaz's rebuttal information up there.
9 May I approach?
10 JUDGE BARNETT: You may.
11 BY MR. BOYDSTON:
12 Q Mr. Galaz, take a look at your
13 rebuttal statement in program suppliers category,
14 specifically paragraph 16. You were asked about
15 this paragraph yesterday by Mr. Olaniran, and it
16 discusses the nature of the Copyright Collective
17 of Canada's criteria for making distributions.
18 Do you see that?
19 A Yes.
20 Q And Mr. Olaniran very - asked you very
21 pointedly if those statements are untrue, are
22 they not, and you answered no, they're true,

9

1 correct?

2 A That's correct.

3 Q And is it your position that they're
4 true?

5 A Oh, they're absolutely correct.

6 Q And what made you - what's the basis
7 for you saying that those statements are true?

8 A As I mentioned otherwise - in another
9 portion of my testimony, we've had a relationship
10 by we I say IPG - since 1998 and I know very
11 thoroughly what -

12 Q Let me pause. You said you have a
13 relationship. With whom?

14 A Copyright Collective of Canada. We've
15 had discussions - correspondence, everything
16 since 1998 with Copyright Collective of Canada.
17 We've been aware of their criteria for a long
18 time.

19 I needed to get - and that was one of
20 the exhibits that we presented - I think 163.

21 That's their formalized distribution rules.

22 However, this criteria has been in effect since

10

1 1998 I know because we discussed it with them on
2 several occasions.

3 I know that we were actually going to
4 ask them to be a witness in these proceedings at
5 one point until we subsequently learned that they
6 were effectively controlled by the MPAA. They
7 even shared a suite with the MPAA in Toronto,
8 Canada.

9 We didn't know that at the time but,
10 of course, we knew what their criteria was which
11 when we actually learned of that it was after we
12 had already proposed the identical criteria in
13 the 1997 cable proceedings that were, I think,
14 started in 2000, '99-2000.

15 Q So prior to setting forth the IPG
16 criteria in 2000, you already were familiar with
17 the CCC criteria, or not? I got confused.

18 A Yeah. No, no. The 1997 cable
19 proceedings was the first time that we were
20 involved in any proceedings and that was in front
21 of the CRB and it was the first time we had
22 proposed any methodology.

11

1 That methodology used the same metrics
2 of duration of a broadcast factored against the
3 number of distant subscribers of the broadcast
4 factored against a viewing weight factor.

5 We proposed that and only subsequent
6 to that found out that it was the identical
7 criteria that was used by the CCC - by the
8 Copyright Collective of Canada.

9 We then wanted to utilize that in
10 subsequent proceedings and in fact were
11 contemplating utilizing him as a witness until I
12 actually visited their offices and discovered
13 that they actually shared a suite, as I said,
14 with the Motion Picture Association in Toronto,
15 Canada and were effectively controlled by them.
16 Knowing then at that point that there was no way
17 that they were going to cooperate with us in that
18 venture we had no reason to discuss it further
19 with them. But it's been over the years, again
20 and again, reiterated that that's the criteria
21 they've always used.

22 Q When did you visit Toronto and

12

1 discover that the same suite was occupied by the
2 MPAA and the CCC?

3 A I think it was in 2000.

4 Q Let me ask -

5 A It still - it still is. They've
6 changed locations but it still is. They still
7 share the same address.

8 Q Let me ask you to take a look at
9 what's been marked and admitted as Exhibit 163.
10 You testified about the fact that you had seen
11 this previously, correct? That you obtained it
12 from the CCC?

13 A That is correct.

14 Q And is this document - well, let me
15 ask it a different way. You had stated that it
16 is - that your statements in paragraph 16 of your
17 rebuttal are true and is this document one of the
18 reasons why you believe that your statements are
19 true?

20 A Certainly. This validates exactly
21 what I testified, which was that the criteria
22 used by the Copyright Collective of Canada is a

13

1 factor or for each broadcast, the duration. I
2 mean, there's a little more to it having to do
3 with, you know, whether or not they're going to
4 pay a royalty on a simulcast transmission,
5 effectively, I guess, would be a way of
6 implementing the syndicated exclusivity rule.
7 But they're still using the same
8 metrics. They're still using for each broadcast,
9 the duration of broadcast multiplied by the
10 number of distant cable subscribers multiplied by
11 the - a daypart viewing factor.

12 Q And can you identify in this document
13 where it is that you read that or where that is
14 consistent with your statement?

15 A Yes. As I referenced yesterday,
16 Article 8 in the document. That's Exhibit 163.
17 If you look at the first couple sentences it
18 starts off that says that the weight that's
19 attributed to a CCC work is the work's viewing
20 weight.

21 It's a defined term. But then you read
22 the next sentence - each work's weight reflects

14

1 its duration, the number of Canadian
2 retransmitted subscribers that received the work
3 on a distant television signal and the share of
4 the overall viewing experience in daypart on the
5 day of the week and in the season when the work
6 was retransmitted.

7 So to that extent, it's using the same
8 metrics. It's a little bit different from the
9 standpoint that their daypart is different than
10 the one we've typically used which breaks it down
11 or aggregates it down - aggregate it down to 96
12 quarter hour dayparts.

13 It looks like they used - there is to
14 be adjusted seasonally. But still using a
15 daypart viewing factor.

16 Q And yesterday Mr. Olaniran pointed you
17 to this same page and this same article eight and
18 asked you to read the second to the last
19 sentence, which begins "The viewing weight is
20 then calculated by multiplying the simulcast
21 weight by viewing factors which reflect the
22 relative amount of viewing of CCC shows on

15

1 distant signals on the applicable day of the week
2 and during the applicable time period when the
3 retransmission occurred."

4 Is there anything about that sentence
5 that gives you pause or makes you think that your
6 statements in paragraph 16 were untrue?

7 A No, it's just a - I think in some
8 respects a generalized way of referring to what
9 occurs prior in the paragraph, which is -
10 references the simulcast wave which, like I said,
11 as I understand it is basically implementing the
12 equivalent of a syndicated exclusivity rule type
13 of allocation and at the same time referring to
14 the daypart viewing factor that it addresses
15 previously.

16 Q Now, at the beginning of the article
17 eight - well, at the end of the first sentence of
18 article eight it refers to dash, the words,
19 capital V, Viewing, capital W, Weight - Viewing
20 Weight - and then that same term of - capitalized
21 term of art, Viewing Weight, begins the second to
22 the last sentence.

16

1 Does the fact that it's using the word
2 Viewing does that give you any pause to the truth
3 of your statement?

4 A No, because, as I said, there is an
5 element of viewing the daypart viewing factor
6 and, as I noted, the specific controls - the
7 general and I think that the second sentence
8 makes all too clear that the viewing weight as a
9 defined term is three metrics that are referenced
10 there.

11 Q Mr. Olaniran asked you very pointedly
12 about some other things too saying that's untrue
13 - that's untrue. Is there anything that you
14 believe was untrue in your testimony regarding
15 the nature of the metrics used by the CCC, AGICOA
16 or Screenrights?

17 A No.

18 MR. BOYDSTON: Thank you, your Honor.
19 I have nothing further.

20 MR. MACLEAN: Just one question, your
21 Honor, if I could ask.

22 JUDGE BARNETT: You may.

17

1 MR. MACLEAN: Is this on? Is this on?
2 JUDGE BARNETT: You have to press it.
3 You have to hold it.

4 MR. MACLEAN: Is it working now?
5 Well, I'll speak up.

6 RECROSS EXAMINATION

7 BY MR. MACLEAN:

8 Q Mr. Galaz, did you tell Ms. Berlin
9 that Mr. Nilsson was under consideration to be
10 IPG's counsel at the time?

11 A I don't recall.

12 MR. MACLEAN: Nothing further.

13 JUDGE BARNETT: Mr. Olaniran?

14 MR. OLANIRAN: Just one, and I think
15 can go from here also.

16 RECROSS EXAMINATION

17 BY MR. OLANIRAN:

18 Q Mr. Galaz, when was the last time you
19 spoke to anyone at CCC regarding how they
20 actually apply article eight in the distribution
21 of royalties?

22 A I think it was - okay. Asking from -

18

1 you're not just referring to my request for the
2 published distribution rules but you're asking
3 for embellishment?

4 Q As to you - when was the last time -

5 A No, I heard you.

6 Q Let me finish my question. Let me
7 finish my question.

8 A Okay.

9 Q When was the last time you spoke to
10 someone at CCC about how CCC applies article
11 eight that you were just talking about?

12 A Probably around calendar years 2000
13 and 2002. It's the exact same one now as it was
14 then and it was when I spoke to - and then it was
15 Susan Peacock, who was the executive director of
16 the CCC.

17 Q So it was about 15 years ago?

18 A That I spoke to them about the same
19 criteria that is published today. That's
20 correct.

21 Q And after the 2000 communications you
22 had with them have you had subsequent

19

1 conversations with anyone else at CCC about this
2 article eight?

3 A Well, I know that what I have had was,
4 and I'm guessing that this was speculated, that
5 it's probably 2006, 2007 I had requested the same
6 document from them.

7 I know I obtained it - I couldn't find
8 it in my files but I know that I requested it at
9 that point in time.

10 At that point in time I don't recall
11 the specifics about walking through it other than
12 to, again, verify that it was based on the same
13 metrics and that - in that case it came up in a
14 circumstance of preparing for potential
15 proceedings that hadn't been announced yet -
16 focusing on what they do outside of the U.S. even
17 though we weren't going to engage anyone from the
18 CCC because we absolutely had no expectation or
19 hope that that could ever occur but nonetheless
20 pulling data in order to use it. Documents like
21 what we presented here can demonstrate how it's
22 addressed in foreign territories.

20

1 Q Since 2000 you don't recall having any
2 - let me finish my question please - since 2000
3 the conversation you had with Ms. Peacock about
4 this article - about the application of article
5 eight, you have not - you don't recall having any
6 other conversation with anyone else at CCC about
7 how article eight is actually applied?

8 A How it's actually implemented?

9 Q Yes.

10 A It's the same.

11 Q That's a yes or no question.

12 A It's - then I guess the answer is no
13 nor had I any reason to.

14 Q Thank you.

15 JUDGE BARNETT: Mr. Galaz, you said in
16 2006 or '07 you requested this document. Are you
17 referring to Exhibit 163?

18 MR. GALAZ: Correct.

19 JUDGE BARNETT: Okay.

20 MR. GALAZ: In preparation for this I
21 looked through a thousand pages trying to find
22 the correspondence.

21

1 JUDGE BARNETT: I just want to make
2 sure that this document referred to the
3 counterpart of what is now 163.
4 MR. GALAZ: Yeah, that is the same
5 document.
6 JUDGE BARNETT: Okay.
7 MR. OLANIRAN: Nothing further, your
8 Honor.
9 JUDGE BARNETT: Thank you, Mr. Galaz.
10 MR. BOYDSTON: Your Honor, IPG will
11 call Laura Robinson. I presume she's waiting in
12 the wings. Your Honor, she's using the
13 facilities. She'll be here in a minute.
14 JUDGE BARNETT: Okay. We can all take
15 a stand and stretch break, even though we've
16 hardly been sitting at all so far.
17 (Whereupon, the above-entitled matter
18 went off the record at 9:25 a.m. and resumed at
19 9:33 a.m.)
20 (Witness was sworn.)
21 JUDGE BARNETT: Please be seated, and
22 that's the court reporter's recording device

22

1 there.
2 DR. ROBINSON: Okay.
3 MR. BOYDSTON: Your Honor, we have
4 updated Exhibits 164 through 179 and 180 through
5 194 and 226, which were updated to reflect the
6 order yesterday afternoon on Envoy-Promark and a
7 couple other things as well.
8 And so we - these were generated last
9 night and we got them this morning and we - I
10 told the clerk we emailed a - we emailed them to
11 the clerk and her email address, although they
12 are in an Excel spreadsheet form that had not yet
13 been converted to PDF or OCR'd or bookmarked.
14 But I went ahead and sent the - what
15 we had this morning. We will PDF it, OCR it and
16 bookmark it in due course and send that as well
17 but I wanted to go ahead and send something in in
18 the meantime.
19 JUDGE BARNETT: So this is - excuse me
20 164 through 169? Is that what you said?
21 MR. BOYDSTON: No. It's - I'll start
22 all over again. It's actually 164 through 194

23

1 plus 226 and I've given hard copies to counsel
2 and I have hard copies I could give you
3 presently, if you wish.
4 JUDGE BARNETT: Mr. Olaniran is on his
5 feet. That was not an announcement. That was a
6 presumption that he had something to say. Mr.
7 Olaniran?
8 MR. OLANIRAN: Yes, I do, your Honor.
9 Thank you.
10 At about 6:42 this morning and at 7:03
11 this morning we received emails from Mr. Boydston
12 sending us exhibits - a total of about 28
13 exhibits and numbered about 60-plus pages.
14 The exhibits purport to be correct in
15 the Envoy-Promark ruling from yesterday and other
16 adjustments which, obviously, we haven't had time
17 to actually look at to figure out what the other
18 adjustments are.
19 And the revised exhibits are
20 problematic for a few reasons, in addition to the
21 fact - aside from the fact that we're just
22 getting this at the last minute.

24

1 For MPAA, it presents a very
2 challenging situation for us. The Envoy-Promark
3 issue that was raised by Mr. MacLean yesterday
4 was based on the judge's order of March 13. We
5 have objections that we believe also affect the
6 exhibits that are now being offered by Mr.
7 MacLean that actually -
8 JUDGE BARNETT: You mean by Mr.
9 Boydston.
10 MR. OLANIRAN: I'm sorry - Mr.
11 Boydston. That hinge on a very similar
12 challenge. The fact that those exhibits actually
13 do not follow the order of March 13.
14 So those exhibits, while they may have
15 faced the Envoy problem if in fact SDC can
16 confirm that they don't fix our problem, our
17 problem, as we have demonstrated in our motion,
18 is that there are no unresolved claims in this
19 proceeding, at least not within the program
20 suppliers category.
21 The order - the March 13 order was
22 very clear on how conflicting claims which these

25

1 exhibits currently do not fully acknowledge that
2 there are no conflicting claims, here's the
3 language of the order on Page 25 of that order.

4 The title of that section is
5 Resolution of Remaining Conflicting Claims to
6 Specific Program Titles. The order talks about
7 that.

8 In the final paragraph on that page
9 the judge's - and I'm reading the judge's
10 language "The judges deny IPG's request to
11 resolve all conflicting claims in its favor.
12 Moreover, in view of IPG's failure to provide any
13 evidence why MPAA's claims should be dismissed
14 and its failure to identify the claims that it is
15 challenging, the judges do not consider this to
16 be a proper challenge.

17 In accordance with the judge's
18 September 23rd, 2013 notice of participants -
19 notice of participants' commencement of voluntary
20 negotiation period and case scheduling in this
21 proceeding, IPG's challenge in this 18, 72
22 program, slash, year combination is deemed weight

26

1 so there are no unresolved claims.

2 There is no question about how or
3 where all the claims within the program suppliers
4 category fall. Any exhibit suggesting otherwise
5 is inadmissible based on this order.

6 So by trying to get Dr. Robinson to
7 now testify to exhibits that contain information
8 that the judges have already ordered waived is
9 creating a record that is prejudicial to MPAA.
10 So our suggestion would be to request a ruling
11 now so that we know whether or not these exhibits
12 are going to be considered by the judges because
13 if they're not going to be considered by the
14 judges we don't want to have to go through
15 another 60 pages of revised exhibits to test
16 whether or not Dr. Robinson has fully complied
17 with the March 13 order.

18 MR. BOYDSTON: This is an attempt to
19 comply with the most recent order of yesterday
20 afternoon and in addition to that, she - as Dr.
21 Robinson did at the very beginning, these
22 documents also reflect her computations assuming

27

1 all those disputed claims are credited to the
2 MPAA.

3 She did originally calculate - before
4 the ruling of March 13th she had calculations
5 assuming side by side all those went to IPG. But
6 side by side was if in case they all went to the
7 MPAA.

8 So it is reflected in there whether -
9 what the distribution would be reflective of the
10 March 13th order and that's what we've updated it
11 to show and that's why we're presenting it here.
12 I mean, we're trying to comply with, you know,
13 with those directives.

14 So no, these reflect that and I don't
15 know any way other to present that then for us to
16 make the calculation and present it.

17 MR. MACLEAN: Your Honor -

18 JUDGE BARNETT: Excuse me. Mr.
19 MacLean?

20 MR. MACLEAN: Your Honor, IPG has
21 known about the March 13th order since, well,
22 March 13th. They didn't comply with it but now

28

1 they - and that was their choice.

2 This isn't a matter of just a small
3 calculation error that they've come in and
4 correct it. This is a matter of recalculating
5 their results in 31 different exhibits, results
6 that, by the way, we only received - Mr.
7 Harrington was able to print out before coming in
8 here.

9 I got them about five minutes before
10 the judges walked in, just a small collection of
11 them. During the break that we just took waiting
12 for Dr. Robinson, my local frenemies at MPAA were
13 kind enough to loan me a copy that they'd managed
14 to print out and then Mr. Boydston literally as
15 Dr. Robinson was walking in here, handed me a
16 copy.

17 I haven't had a chance to look at
18 these exhibits at all. We haven't received the
19 underlying code for these exhibits. So our
20 witness, Dr. Erdem, hasn't had a chance to look
21 at them at all.

22 We've got absolutely no idea what

29

1 calculations go into this. But the important
2 thing here is this was IPG's choice. They've
3 been on notice for - well, since March of the
4 judge's orders.

5 They've been on notice since at least
6 last Tuesday of our position that Envoy programs
7 should be included. By the way, you can go
8 through IPG's entire exhibit binder and not find
9 one reference to the fact that they did include
10 Envoy programming.

11 The only way we were able to figure it
12 out was by going back into their codes - through
13 their codes to figure out that they were
14 including Envoy programming. We would have had
15 no way of knowing that otherwise.

16 I mean, not only did they - did they
17 include it, they did not openly include it. And
18 now they come in, having been called on this,
19 halfway through the hearing, three days into the
20 hearing, and hand us this stack of exhibits with
21 no codes, no way for us to go through and verify
22 whether Envoy programming is still included.

30

1 I'll point out that there is a note here that
2 says that The City that Forgot About Christmas is
3 still included, which was - which is a program
4 that should have been excluded under the judge's
5 orders excluding cross-claimed programs.

6 MR. BOYDSTON: I'm reading from your
7 order. I conclude that seven of them should be
8 categorized as program suppliers and one of them,
9 The City that Forgot About Christmas, should be
10 categorized as - categorized as devotional.
11 That's 180 degrees what he just said.

12 They have the underlying data. It's
13 the same data we produced a long time ago.
14 That's the difference.

15 JUDGE BARNETT: Mr. Boydston, I think
16 you interrupted Mr. MacLean.

17 MR. BOYDSTON: Oh, I'm sorry. I
18 thought he was done. I beg your pardon.

19 MR. MACLEAN: City that Forgot About
20 Christmas was categorized as devotional. That is
21 correct. However, in another part of the judge's
22 orders you disqualified programs that are cross-

31

1 claimed between claimants other than Envoy-
2 Promark.

3 City that Forgot About Christmas
4 appears to be the same program as City that
5 Forgot Christmas, which is claimed by Envoy-
6 Promark and Pacific, cross-claimed with other
7 claimants.

8 So that program also is excluded by
9 your - by the judge's orders. Not from the
10 devotional category but altogether from these
11 proceedings because it was cross-claimed. So
12 that's - according to this note here that has
13 been removed.

14 Aside from that, we haven't had a
15 chance to look at these - at these exhibits.
16 It's going to take simply more than the two
17 minutes before the judges walked in to get an
18 understanding.

19 I will say with respect to Exhibit 226
20 - this is the one that I've actually had an
21 opportunity to examine - this one is actually
22 already in evidence or at least IPG's previous

32

1 version, so with this one in particular we would
2 object to it being admitted as a replacement
3 because it's replacing an exhibit that's already
4 been in evidence and has had testimony on it.

5 With respect to all of the others
6 these are calculations that I need the codes to
7 understand. Dr. Erdem needs the codes to
8 understand and, most importantly, we need time to
9 understand.

10 This is a - this is a problem of IPG's
11 creation because they chose to ignore the judge's
12 March 13 order.

13 MR. BOYDSTON: May I have a chance to
14 speak?

15 JUDGE BARNETT: You may.

16 MR. BOYDSTON: Your Honor, first of
17 all, as I said, the underlying codes are the same
18 that they've had. This is not a wholesale change
19 of methodology or anything else. This, as in
20 prior proceedings, is an update of numbers based
21 upon things that have come up very recently, the
22 most recent one being your ruling yesterday

33

1 afternoon on the Envoy issue.

2 Now, should we have sat on our hands
3 last night? No. In fact, we stayed up very
4 late, or I should say our experts did,
5 recalculating these numbers so that they would
6 reflect your order from yesterday.

7 With regard to that, the basis upon
8 which we have the opposite assumption was - and
9 I'm reading from your order - for the foregoing
10 reasons the judge grant the SDC request to
11 disallow the devotional programming, the claims
12 disqualified by Mr. Rovin and claim on behalf of
13 Willie Wilson Productions.

14 That was the basis for our conclusion
15 that the Envoy programs were still in. I
16 understand that you ruled from the bench
17 yesterday that is an incorrect interpretation.
18 However, given that language I don't think it was
19 unreasonable even, if it's false or even if it's
20 incorrect, rather.

21 We accept that. So we didn't sit on
22 our hands. We've made a change to reflect that.

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1 In addition to that, there have been
2 other things when they were going through this
3 they recognized other errors and rather than
4 pretend those errors didn't exist; they simply
5 corrected those errors.

6 There are inputting errors and things
7 like that which Ms. - Dr. Robinson is going to
8 explain.

9 We did this in the 1998-99 proceeding
10 and the previous proceeding. Obviously when
11 something is pointed out that there is an error
12 in computation, I think what you want us to do
13 is as we have in prior proceedings, have our
14 expert recompute it and then substitute the
15 corrected tables for the uncorrected tables.
16 That's all we're doing here.

17 JUDGE BARNETT: Thank you. Mr.
18 Olaniran?

19 MR. OLANIRAN: Just a quick point.
20 The issue simply is, did IPG follow the March 13
21 order with respect to the judge's ruling on
22 completing this claim.

35

1 The order - the language about
2 reference is very clear and there should be no
3 question about unresolved claims based on their
4 language. So if there is no question about that,
5 there should be no exhibit purporting otherwise.

6 The judges have been very clear in
7 this order. So attempting to introduce and we
8 briefed this extensively - we move to strike any
9 reference that suggests that there is a scenario
10 under which IPG would receive a conflicted title.
11 There is no such thing.

12 So any exhibit that purports to -
13 respect to numbers, graphs or any related
14 testimony on that issue is completely in
15 violation of that order and there's no reason for
16 that to be part of this record.

17 JUDGE BARNETT: So the relief your
18 requesting, Mr. Olaniran, is?

19 MR. OLANIRAN: A ruling now on whether
20 or not any exhibits that contain such information
21 is admissible and we have - we identified very
22 specifically in our briefs what the related

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1 exhibits are and I'm also, following that ruling,
2 also requesting that the IPG exhibits that were
3 submitted this morning or that were distributed
4 this morning be denied admission.

5 JUDGE BARNETT: And Mr. MacLean, you
6 have - you are requesting separate relief?

7 MR. MACLEAN: Yes, your Honor. I
8 mean, I join Mr. Olaniran's request. I agree
9 with him. But we request rejection of all these
10 substituted exhibits on the grounds not that they
11 correct small computational errors - I wouldn't
12 object on that basis - but on the grounds that
13 they - that they - that IPG has by its own choice
14 ignored the board's order and created this
15 problem of its own making, and on the basis that
16 I haven't had time to review them.

17 MR. BOYDSTON: Your Honor, when we do
18 these - when they created these things
19 originally, as I said, back in eight months ago,
20 they, as I said, had two scenarios. One scenario
21 was everything goes to IPG, one goes me. Keep in
22 mind -

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1 JUDGE BARNETT: I've heard that, Mr.
2 Boydston.
3 MR. BOYDSTON: Okay. When they
4 recreated them, they kept them that way. It
5 wasn't for some subterfuge.
6 We have no objection to, you know,
7 crossing out the part that says it all goes to
8 IPG if that's going to resolve the problem. The
9 charts were originally done that way.
10 When they redid them they kept them
11 that way even though we're not making any
12 argument that it all should go to IPG. That was
13 just the way it was done originally.
14 JUDGE BARNETT: Understood. Okay. My
15 colleagues and I are going to confer.
16 MR. BOYDSTON: If I could just have
17 one quick moment to, on the Envoy thing, very
18 briefly. Again, we aren't trying to pull a fast
19 one here. I read you where you said we
20 disqualified - the claims disqualified
21 maintenance to Rovin.
22 The order then said Mr. Rovin

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1 evaluated these eight programs and concludes that
2 seven of the eight should be categorized as
3 programs falling within the program suppliers
4 category.
5 Then it went on to say of these eight
6 I conclude seven he said, of these eight I
7 conclude the seven of these should be categorized
8 as program suppliers programs and one, the City
9 who Forgot about Christmas should be categorized
10 as devotional.
11 So I don't think there's any argument
12 that the City about Christmas is not devotional.
13 That's what Mr. Rovin said and that's what you
14 adopted. Now, the rest of them we've taken out
15 as per your order yesterday.
16 MR. OLANIRAN: Just a quick response
17 to the statement that Mr. Boydston just made. On
18 page 12 of our motion to strike, we do actually
19 cite the language from Dr. Robinson's testimony
20 and in that quote, it says the second set of
21 dealership shares is calculated under the
22 assumption that these program titles claimed by

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1 both MPAA and IPG were awarded to IPG.
2 MR. BOYDSTON: There's no argument
3 about that. You can strike it.
4 JUDGE BARNETT: Thank you.
5 (Whereupon, the above-entitled matter
6 went off the record at 9:50 a.m. and resumed at
7 10:15 a.m.)
8 JUDGE BARNETT: Please be seated.
9 Travel with us now back to Monday, when, Mr.
10 MacLean, you objected to IPG continuing to claim
11 any Envoy/Promark titles. Were you objecting to
12 their claiming them in the devotional category or
13 at all?
14 MR. MACLEAN: Your Honor, we objected
15 to IPG claiming any Envoy title in the devotional
16 category. We objected to IPG claiming the City
17 that Forgot About Christmas at all.
18 JUDGE BARNETT: Okay. I just wanted
19 to clarify because the judges and I didn't have
20 difficulty ascertaining our own order but, you
21 know, we wrote it.
22 So but I wanted to make sure I

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1 understood what I granted when I said you were
2 correct that the Envoy/Promark programs were not
3 devotional. Doesn't mean they're not program
4 suppliers and you understood that. Everyone
5 understood that.
6 Good. Then it was only I who was
7 confused. So Mr. Boydston, in these updated
8 exhibits, what - by category, not by line, what
9 changes are you making or proposing?
10 MR. BOYDSTON: Your Honor, if I may
11 put on my glasses, for instance, they describe
12 within them the changes and so I can give you a
13 good for-instance in that regard and if you - I
14 can just read it to you but in the first set of -
15 it starts at Exhibit 164, at the bottom of the
16 revised 164, it says this exhibit is an amendment
17 to the table appearing in the Exhibit 164 -
18 revisions are described in the April 15th
19 amendment to 172.
20 As you go through at 172, which is
21 sort of the summing up of several previous
22 charts, the exhibit has that explanation and give

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1 me two seconds to find it.

2 I just read the second one. It says,
3 and there's a laundry list for those particular
4 exhibits up to 172 so it's revisions. IPG claims
5 for Salem Baptist Church have been reinstated, et
6 cetera. IPG claims for Envoy are considered
7 program supplier, not devotional, et cetera.

8 IPG claims for Devillier Donegan
9 Enterprises are then removed. Programming code
10 errors related to time restrictions which were
11 cited by Mr. Gray and Mr. Erdem have been
12 corrected.

13 Program code errors related to the
14 program length on attributing data pointed out by
15 the MPAA have been corrected.

16 Subscribers to each station were
17 calculated for the methodology used by Dr. Erdem
18 in his written rebuttal testimony because he
19 pointed out a situation in which they had each
20 made a mistake. He had corrected his side of it.
21 We were correcting our side of it. So -

22 JUDGE STRICKLER: Who made your

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1 reflect changes that require recalculation. It
2 only makes sense. Why would we want stale
3 numbers when we're trying to make a decision
4 about numbers?

5 The difficulty here is the timing and
6 what we're going to do is we're going to renumber
7 - we're going to renumber these exhibits starting
8 with number 250.

9 So during the lunch break or whatever,
10 start renumbering those. 164 will be 250 and so
11 forth. 226 we can leave as 226. Pardon me?

12 CLERK: We already have a 250, 251 and
13 252.

14 JUDGE BARNETT: We do?

15 CLERK: Well, I numbered the ones that
16 - the rebuttal and the -

17 JUDGE BARNETT: Oh, okay. I'm sorry.
18 So is 253 the next number, Ms. Whittle? I'm
19 sorry. 253 will be 164. It's going to be a
20 little confusing but you can take time to mark -
21 make mental notes, make a table or whatever.

22 MR. BOYDSTON: Can I direct Dr.

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1 corrections? Which witness?

2 MR. BOYDSTON: This witness.

3 JUDGE STRICKLER: Dr. Robinson?

4 MR. BOYDSTON: Yes, yes. Not me. I'm
5 just reading. So I mean, if we were to go
6 through these, these are updates of the original
7 exhibits, of course.

8 But it seemed disingenuous to me to
9 the extent we could to not come up with ones that
10 have legitimate corrections in them, as we've
11 done in prior proceedings.

12 JUDGE BARNETT: Okay. We have a
13 double-edged sword here. We have an order that
14 is over a month old and we have new exhibits that
15 are under 12 hours old.

16 That's they are incongruous. There
17 was plenty of time to do this, to seek
18 clarification, to seek guidance, whatever, if the
19 order was not clear. But we believe the order
20 was clear.

21 We have always in prior proceedings
22 and probably will continue to permit updates to

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1 Robinson to call her office and tell them to
2 begin that process? It will just help us get
3 ones that are renumbered that much quicker?

4 JUDGE BARNETT: Yeah, or you can
5 scratch off the numbers and write them on. I
6 don't care how -

7 MR. BOYDSTON: Well, it'll be a lot -
8 I think it'll be a lot more efficient and easier
9 for everyone to lead if they simply bring over
10 new ones with the new numbers. But -

11 JUDGE BARNETT: You do it however you
12 want to do it, Mr. Boydston, just as long as it
13 happens. Then counsel for the other two parties,
14 it's provisional acceptance - we're all assuming
15 they're going to be awkward, right?

16 Provisional admission subject to your
17 being allowed time that you require to review
18 them, to make objections to them in writing for
19 us to rule on those objections. We don't have a
20 jury here to - the likelihood of confusion is
21 nonexistent, but it's a lot less likely than if
22 we had a jury here. The judges are generally

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1 able to segregate admissible from nonadmissible
2 evidence.

3 So if you after you've had an
4 opportunity to review them in the context of Dr.
5 Robinson's testimony, if you still have
6 objections, you can put them in writing. You can
7 send them to us. Mr. Boydston can respond and we
8 will rule accordingly.

9 MR. OLANIRAN: If I may. I don't
10 think there's any question at all that those
11 exhibits continue to reflect information that IPG
12 would be awarded conflicting titles. So we have
13 objections and a motion to strike and my comments
14 earlier this morning.

15 So we don't - we would not expect to
16 file any additional objections on that particular
17 issue. So those are already standing.

18 JUDGE BARNETT: Okay. That's fine,
19 and those are on the record and Mr. Boydston has
20 represented on the record today that he would
21 redact or we could strike or we could ignore all
22 of the calculations that award conflicting claims

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1 calculations have changed. So I guess we could
2 provide the files by which the calculations have
3 been made. I mean, you can probably - the
4 underlying code in addition but -

5 JUDGE BARNETT: Yes.

6 MR. MACLEAN: And today if possible,
7 your Honor.

8 JUDGE BARNETT: Before the end of the
9 week.

10 MR. BOYDSTON: I misspoke on this
11 stuff.

12 MR. GALAZ: The electronic codes have
13 already been provided. That's what was emailed
14 this morning.

15 MR. BOYDSTON: Oh, I didn't realize
16 that. I didn't know that had occurred. The
17 underlying codes? Everything -

18 MR. GALAZ: I'm sorry, your Honor.
19 May I -

20 MR. BOYDSTON: May he speak?

21 JUDGE BARNETT: Yes.

22 MR. BOYDSTON: He looked at it, not

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1 to IPG when the decision has been made that they
2 are in fact MPAA-claimed. Okay.

3 MR. OLANIRAN: Thank you.

4 MR. MACLEAN: Your Honor, in assisting
5 us in reviewing these exhibits and making
6 whatever objections that we have, first of all,
7 would we also be permitted if necessary to
8 present additional evidence and rebuttal to these
9 exhibits?

10 JUDGE BARNETT: You may. We actually
11 reserve the right to have - to have - reserve the
12 right to recalling witnesses if necessary. But
13 yes, if it requires evidence, yes.

14 MR. MACLEAN: And my second question -
15 in assisting us in performing that operation
16 would the judges order IPG to produce underlying
17 codes and calculations that went into
18 recalculating these exhibits?

19 JUDGE BARNETT: Absolutely. Mr.
20 Boydston is nodding. He will do so.

21 MR. BOYDSTON: I would just point out
22 the underlying code has not changed. The

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1 me.

2 MR. GALAZ: Yes. Everything that was
3 - that was generated by Navigant Consulting today
4 that was received by us includes the codes. That
5 was produced this morning electronically via
6 Excel spreadsheets that show all the calculations
7 and tie everything together.

8 So from that standpoint, I think maybe
9 Ms. Robinson may have -

10 JUDGE BARNETT: So we'll have the
11 witness address that, okay, instead of having
12 these stray comments from the - from the gallery.
13 All right.

14 So Mr. Boydston, I think you were
15 consulting with your client when I told Mr.
16 MacLean you would assure him that the codes - he
17 has the codes by the end of the week. If they're
18 not there, they have to be there by the end of
19 the week.

20 MR. BOYDSTON: Understood.

21 JUDGE BARNETT: Okay. Would you like
22 to examine Dr. Robinson?

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1 MR. BOYDSTON: I would, your honor.
 2 But I would -
 3 JUDGE BARNETT: But wait.
 4 MR. BOYDSTON: - not so fast.
 5 MR. BOYDSTON: But wait, there's more.
 6 MR. MACLEAN: Your Honor, the SDC
 7 would move to disqualify Dr. Robinson as a
 8 witness. During the - during the break that we
 9 just had this witness, contrary to your
 10 exhortations in the past, after being sworn in
 11 and put on the stand, was having discussions
 12 about IPG's exhibits with counsel for IPG.
 13 MR. BOYDSTON: I don't think she was
 14 sworn in and she had started testifying. I was
 15 asking her about these matters pertinent to what
 16 we're talking about now.
 17 JUDGE BARNETT: She was sworn in.
 18 MR. BOYDSTON: But she had not yet
 19 testified about anything and I was asking her
 20 about these issues to assist the judges.
 21 JUDGE BARNETT: Dr. Robinson, you had
 22 conversations during our conference with Mr.

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1 Boydston. Is that correct?
 2 DR. ROBINSON: Yes.
 3 JUDGE BARNETT: Okay. And what was
 4 the substance of your conference - of your
 5 conversations without - you don't have to reveal
 6 any attorney-client privilege to the extent you
 7 have one. But
 8 DR. ROBINSON: I want to say I don't
 9 even remember the specifics. It was just
 10 something about the ordering of the exhibits and
 11 what would be included, something.
 12 JUDGE BARNETT: Did it - did you
 13 discuss in any way the substance of your
 14 testimony here today?
 15 DR. ROBINSON: No.
 16 JUDGE BARNETT: Thank you. Overruled.
 17 Go ahead, Mr. Boydston.
 18 MR. BOYDSTON: Thank you, your Honor.
 19 I have here these copies. Would you like me to
 20 distribute them to you? I have old numbers but I
 21 -
 22 JUDGE BARNETT: I would like you to

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1 try to - are there other questions you have for
 2 Dr. Robinson? I'd like you to change the numbers
 3 on them before you give them to us.
 4 MR. BOYDSTON: Okay.
 5 JUDGE BARNETT: If that's possible.
 6 Maybe Mr. Galaz could work on them while you are
 7 asking other questions.
 8 MR. OLANIRAN: Your Honor, may I make
 9 a suggestion?
 10 JUDGE BARNETT: Please.
 11 MR. OLANIRAN: Mr. Boydston will be
 12 numbering the exhibits separately and we have a
 13 set of unnumbered exhibits and so does SDC. If
 14 we could have maybe five minutes so we could
 15 jointly number them and so that we can all follow
 16 on where we all joined.
 17 JUDGE BARNETT: I think that's a
 18 capital idea. Let's take our morning recess, as
 19 if we need one. And give you the opportunity to
 20 do that.
 21 MR. OLANIRAN: Thank you.
 22 (Whereupon, the above-entitled matter

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1 went off the record at 10:28 a.m. and resumed at
 2 10:57 a.m.)
 3 JUDGE BARNETT: Please be seated. The
 4 Court --
 5 MR. BOYDSTON: Your Honor, we've
 6 collectively done the renumbering.
 7 JUDGE BARNETT: Excellent.
 8 MR. BOYDSTON: One thing I just wanted
 9 to be clear on, though, I conferred with Counsel,
 10 266 you didn't, you told us not to remember, and
 11 I wasn't sure why, and --
 12 (Off the record comments.)
 13 MR. BOYDSTON: I keep saying that. I
 14 keep messing these up, 226. You told us not to
 15 remember, I wasn't sure why, should we renumber
 16 it?
 17 JUDGE BARNETT: Just call it 226A.
 18 (Whereupon, the document referred to
 19 was marked as IPG's Exhibit 226A for
 20 identification.)
 21 MR. BOYDSTON: Great.
 22 JUDGE BARNETT: So we're clear.

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1 MR. BOYDSTON: With that, may I give
2 them to Your Honor and your colleagues?
3 JUDGE BARNETT: Please. Thank you.
4 (Off the record comments.)
5 DIRECT EXAMINATION
6 MR. BOYDSTON: Good morning, Dr.
7 Robinson. As you know, I'm Brian Boydston, the
8 Counsel for Independent Producers Group. I think
9 you, have you, if you haven't already, has she
10 stated her name for, and spelled her name for the
11 record?
12 JUDGE BARNETT: I don't think she's
13 done that, yet. Have you, Dr. Robinson, spelled
14 your name for the record?
15 DR. ROBINSON: I have not.
16 JUDGE BARNETT: Will you, please?
17 DR. ROBINSON: My name is Laura
18 Robinson, L-A-U-R-A, R-O-B-I-N-S-O-N.
19 MR. BOYDSTON: Dr. Robinson, you are
20 a doctor, correct?
21 DR. ROBINSON: Yes.
22 BY MR. BOYDSTON:

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1 Q Please, tell us a little bit about
2 your educational and professional background.
3 A I have a college degree from Harvard
4 University, majoring in economics. I have a
5 Master's Degree in economics from Columbia
6 University.
7 I have a Master's of Philosophy Degree
8 from Columbia Business School in finance and
9 economics, and a PhD from Columbia Business
10 School in finance and economics.
11 Q And what is your present professional
12 position?
13 A I am a Managing Director at Navigant
14 Consulting where I specialize in economics,
15 statistical and valuation financial analyses for
16 complex commercial litigation.
17 Q And how long have you been at
18 Navigant?
19 A I've been at Navigant since the
20 beginning of 2011.
21 Q And while you've been there, I think
22 it may have been included with the items you've

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1 mentioned, but have you been engaged previously
2 to provide valuation analyses in connection with
3 litigation?
4 A I mean, I've been in this business for
5 about ten to 15 years.
6 Q And how would you describe this
7 business, more or less?
8 A Well, I work on a variety of matters.
9 It's not always litigation, but it's often
10 litigation, sometimes it's corporate strategy,
11 but some situation where a company is in need of
12 a financial economist to do an analysis relating
13 to valuations.
14 Sometimes you have a merger situation
15 where you're trying to unwind, because of
16 misrepresentations at the time of the merger.
17 Sometimes it's patent infringement where you need
18 to evaluate the reasonable royalty. Sometimes
19 it's securities fraud where you need to look at
20 the economic damages. So a variety of matters.
21 Q And in your work doing that, you used
22 the word valuation a number of times, had you

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1 been called upon to come up with a to quote
2 unquote fair market value of particular items,
3 commodities, things like that?
4 A Yes, securities, assets, companies,
5 big and small.
6 Q Have you done valuation analyses of
7 any media properties?
8 A I have. In the case of American Idol,
9 one of the things I did in that matter was
10 evaluate, we had confidential data about the
11 negotiations between Fox and the rights holders
12 to American Idol and I did an economic analysis
13 of that negotiation.
14 I have also worked on other matters.
15 For example, there was a matter between a company
16 called Signatures, Signature Networks, Inc., the
17 Major League Baseball Advanced Media where they
18 were doing a joint venture and Signature Networks
19 was a content company with a music and
20 celebrities and various artists properties,
21 including, you know, Madonna and Bruce
22 Springsteen, et cetera, and I did value that

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1 joint venture.

2 Q Let me, have you ever been called upon
3 to do a valuation of something like a movie, or a
4 television show, or shows?

5 A Yes. So, well, in the CKX case where
6 I looked at American Idol, I also looked at So
7 You Think You Can Dance and the value of that,
8 and there were also properties, there was Elvis
9 Presley Franchise and the Muhammad Ali franchise.

10 With respect to movies, I worked on,
11 the case was MGM versus Sony where there was a
12 dispute about the James Bond film franchise, and
13 I valued the James Bond film franchise, as well
14 as looking at the impact of the dispute.
15 Basically, Sony was saying that it owned certain
16 of the rights to the franchise and the impact
17 that that had, which MGM disagreed with, and one
18 of the questions was, what was the impact of that
19 on MGM's IPO, which was happening around about
20 the same time? So that's another example.

21 Q Have you been qualified, as an expert,
22 in valuing different commodities, intangibles,

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1 things like you described, before different
2 courts of a law?

3 A If qualified means having testified to
4 it, yes.

5 Q And in fact, you've appeared before
6 this tribunal in the past and been qualified as
7 an expert, is that right?

8 A Yes.

9 Q And what have you been called upon to
10 do in this matter?

11 A I have been called upon to look at the
12 relative market value of the programming claimed
13 by the different parties in this case.

14 MR. BOYDSTON: Your Honor, I'd like to
15 move to admit Dr. Robinson as an expert in the
16 field of valuation and fair market value and
17 economics and statistics.

18 JUDGE BARNETT: Valuation, economics,
19 and statistics?

20 MR. BOYDSTON: Yes.

21 JUDGE BARNETT: And there was some
22 qualifier that you put on valuation.

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1 MR. BOYDSTON: I think fair market
2 value of --

3 JUDGE BARNETT: Fair market value.

4 MR. BOYDSTON: I think I just said
5 fair market value.

6 JUDGE BARNETT: That, okay. Mr.
7 MacLean?

8 MR. MACLEAN: No objection.

9 MR. OLANIRAN: No objection, Your
10 Honor.

11 JUDGE BARNETT: Dr. Robinson is
12 qualified to testify in the areas of valuation,
13 economics, and statistics.

14 MR. BOYDSTON: Dr. Robinson, what
15 materials were you provided to form an analyses
16 in this case?

17 DR. ROBINSON: There were a lot of
18 materials. There was data on the various titles
19 being claimed by the parties, data, broadcast
20 data from the Tribune data from various stations
21 and CDC data with additional information.

22 BY MR. BOYDSTON:

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1 Q Do you recall preparing a written
2 testimony, filed earlier in these proceedings?

3 A I do.

4 Q And do you recall preparing an amended
5 testimony to that testimony and filing it also,
6 for filing in this proceeding, also?

7 A I do.

8 Q And in those, do you list all the
9 materials that you've been provided?

10 A I don't recall. And if I look at the
11 report, then --

12 Q Okay.

13 A -- I'm sure I did --

14 Q All right.

15 A -- I assume I did.

16 Q Okay. And did you also prepare two
17 rebuttal testimonies in this proceeding?

18 A Oh, you mean one --

19 Q I --

20 A Yes.

21 Q I think it was one, yes.

22 A Yes, I mean, it was, I guess, one for

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1 the SDC, for the devotional category and one for
2 the department.

3 Q Yes, okay. In engaging in the task
4 put to you, what do you consider to be indicia of
5 economic value of the re-transmitted broadcast
6 that is the subject of this matter?

7 A As I discussed in my written testimony
8 some of the indicia of economic value are the
9 number and length of the broadcast, the fees
10 paid, the number of distance subscribers, and the
11 time of day of the broadcast.

12 Q And why do you believe that these
13 indicia are relevant to the task at hand?

14 A They're relevant because they help us
15 get to an understanding of the value, and because
16 that's the data I had available. I think it is,
17 and I think that the Judges have also indicated
18 that subscribership is probably a better measure,
19 but the data that we do have speak to, speak to
20 the economic value in the following ways.

21 So the time of day, we know that
22 certain times of day we have more viewership, and

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1 so on average you would expect broadcast shown at
2 that time of day to go in a greater viewership
3 than broadcasts shown at times of day with fewer
4 viewership.

5 With respect to fees and subscribers,
6 again, that kind, their fees and subscribers are
7 somewhat related, because the fees are based on
8 the number of subscribers. But, essentially,
9 that gets at the idea of how many subscribers are
10 available to be watching the show, or the
11 broadcast, and you would expect, in general, if
12 there's more subscribers available that you would
13 be getting more viewers.

14 Q Okay.

15 JUDGE BARNETT: Dr. Robinson. Excuse
16 me, Mr. Boydston. We use the term fees in these
17 proceedings, I think, fairly loosely, to include
18 royalties, or to substitute for the term
19 royalties, and I need to know what you mean when
20 you say fees paid, fees paid by whom to whom?

21 DR. ROBINSON: Fees paid by cable
22 system operators, based on the number of

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1 subscribers.

2 JUDGE BARNETT: So royalties?

3 DR. ROBINSON: Yes.

4 JUDGE BARNETT: Royalty fees deposited
5 with the Copyright Office --

6 DR. ROBINSON: Exactly.

7 JUDGE BARNETT: Is that what you mean?

8 DR. ROBINSON: Yes.

9 JUDGE BARNETT: Not what they pay the
10 broadcast stations?

11 DR. ROBINSON: No. Sorry.

12 JUDGE BARNETT: Okay. Thank you.

13 MR. BOYDSTON: And my understanding
14 from your last answer, and I guess I'm wanting to
15 find out if my understanding is correct, I think
16 it is, but, the fees paid by the cable and
17 satellite system operators for the Copyright
18 Office for this compulsory license, are based on
19 the number of subscribers they have, is that
20 correct?

21 DR. ROBINSON: That's my
22 understanding.

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1 BY MR. BOYDSTON:

2 Q Okay. Now, are you familiar with the
3 other methodologies that are proposed in this
4 manner by SDC and the MPAA?

5 A Yes.

6 Q And you understand that their analyses
7 are based on viewership?

8 A Yes.

9 Q And when I say viewership, what is
10 your understanding of what they're basing their
11 analysis on?

12 A Well, they are both coming up with a
13 different methodologies to estimate distant
14 viewership.

15 Q And what indicia of viewership do they
16 rely upon?

17 A Well they're relying on their
18 estimates of distant viewership. So in Erdem's,
19 Dr. Erdem's case, he is using local ratings as an
20 estimate of distant viewership. Pure and simple,
21 he makes no adjustments for any difference, or
22 any relationship between local ratings and

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1 distant ratings.

2 Dr. Gray does a somewhat more
3 sophisticated analysis and he develops a
4 relationship between distant viewing and ratings
5 for four years' worth of data, and then uses that
6 relationship to come up with a predictive model
7 to predict distant viewing in the years for which
8 he would like to use distant viewing as his
9 measure of relative market value.

10 Q Now when you say ratings, are you
11 referring to Nielsen Ratings?

12 A Yes.

13 Q For both those methodologies?

14 A Yes.

15 Q Do you believe there are benefits to
16 your methodology, or analysis, relative to the
17 analysis based on viewership?

18 A I do. I'm not sure I would
19 characterize it exactly that way. So, but let me
20 answer the big question first, and then maybe the
21 smaller question second. The big answer is, the
22 challenge with Dr. Erdem and Dr. Gray is that

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1 they don't need half the data that they need in
2 order to do their analysis, so they're making
3 estimates and predictions and forecasts.

4 The benefit of the data that I'm using
5 is that it exists for the years in which we're
6 using it. So it's a little bit less, well, it's
7 a lot less removed from what we're measuring.

8 That said, I would not say that
9 they're measuring viewership and I'm not
10 measuring viewership. I would say that for two
11 reason. One, because as I've already testified,
12 for example, by using the time of day measure,
13 that's getting a viewership, I'm just using a
14 national average viewership measure there.

15 And to some degree, the royalty fees
16 and the subscribership also relate to viewership,
17 because ardently has to do with the number of
18 subscribers watching the station, not watching,
19 but subscribing to the station, who, I mean, in
20 the process of consumption of this group that
21 they're paying for are going to be viewing.

22 I think the, you know, the real issue

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1 is that the relationship between subscribership
2 and viewership is what we would like to really
3 unpack, but which none of us have the data to do.

4 Q Okay. Now you've done, you've
5 analyzed both cable re-transmission royalties,
6 distribution thereof, if you will, and
7 distribution of satellite royalties, is your
8 cable analysis based on a random sampling of
9 stations to look at?

10 A Yes it is.

11 Q And how did you come up with that
12 random sample?

13 A I conducted a stratified random
14 sampling approach, very similar to the approach
15 that Dr. Gray used.

16 Q And with regard to satellite, was that
17 analysis based on a random sample?

18 A I would say that that analysis is
19 really essentially based on the entire population
20 rather than on a random sample.

21 Q Okay.

22 A So not the entire population, but it's

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1 very close having 98 to 99 percent, covering 98
2 to 99 percent of the distant subscribers.

3 Q And in your expert opinion, is that
4 sufficient to cover the whole field for all
5 intents and purposes?

6 A Yes.

7 Q Is there a difference between the
8 sample stations you use for analyzing and program
9 supplier claims versus devotional claims?

10 A Yes. So in the program supplier
11 situation, I used the overlap between the
12 stations and my random sample and the stations in
13 Dr. Gray's sample.

14 And the reason that I did that is
15 because, I did not have an electronic copy of the
16 titles. Well, no, let me rephrase that. Well,
17 Dr. Gray produced the list of, an electronic list
18 of titles in the stations that were in his
19 sample.

20 So if I had applied that to my sample,
21 the ones that don't overlap with his, then I may
22 have, that could have inadvertently been to

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1 MPAA's disadvantage, because there may be titles
2 in the stations that were in my sample that were
3 not in Gray's sample that I wouldn't know about,
4 because he only gave me the list of titles for
5 his stations. So in order to not be missing
6 titles that were in the other stations, I used
7 the overlap. Is that better?

8 Q So you took the stations that you had,
9 the random sample stations you had for cable and
10 you, instead of using all of those, you only used
11 those that were also in Mr. Gray's group?

12 A All right, so -- I only used those for
13 which I had a complete list of MPAA titles.

14 Q Okay. Now, as for the devotional
15 claims, was there an issue like that?

16 A No.

17 JUDGE STRICKLER: Question for you,
18 Dr. Robinson, with regard to your overlapping
19 sample, Dr. Gray's and your own, do you believe
20 that by using the overlapping titles that the
21 combined sampling was no longer a random
22 sampling?

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1 DR. ROBINSON: I would agree that as
2 a general principle, it is not no longer a random
3 sample. At the same time, I would say that it's
4 still covering of all the data. Excuse me. I
5 think I can look at my report, but roughly 85
6 percent, I think.

7 JUDGE STRICKLER: When you say it's
8 covering the majority of the data, are you saying
9 the majority of the data that was in the samples,
10 or the majority of the population?

11 DR. ROBINSON: The population.

12 JUDGE STRICKLER: Okay.

13 MR. BOYDSTON: Would you characterize
14 your analysis as an analysis of volume?

15 DR. ROBINSON: Essentially what I do,
16 and, frankly, it's the same thing that Dr. Gray
17 and Dr. Erdem do, is I compute the volume, and
18 then I compute various factors looking at the
19 average value per broadcast for each of those
20 factors, and then multiply the two together so
21 that you have an average value, you multiple it
22 by the number of broadcasts, then that's how you

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1 get your results.

2 Dr. Gray and Dr. Erdem are doing
3 exactly the same thing. They might, perhaps,
4 characterize it slightly differently, but
5 mathematically it's perfectly equivalent, so that
6 they're, basically, taking the average viewership
7 for a broadcast and multiplying that by the
8 number of broadcasts. So it's really the same
9 process, it's a question of, you know, which of
10 the factors that you're using.

11 BY MR. BOYDSTON:

12 Q Okay. I think you may have touched on
13 this already, but I'm not positive, so I'll ask
14 the question anyway. Is a viewership analysis
15 similar to an analysis of volume?

16 A Well, I think I just tried to answer
17 that, but I'll try again.

18 Q I think you did, too. That's why I
19 was, I'm not sure if I was correctly following
20 your line of thought.

21 A What I'm saying is that, you know, I
22 list three factors in my direct report and I add

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1 viewership as a factor in my rebuttal report, I
2 mean, the distant subscriber viewership in my
3 rebuttal report, and Dr. Erdem and Dr. Gray,
4 basically, just use the one factor, which is the
5 distant viewership factor.

6 So it's that factor, whether it's
7 viewership, the time of day, subscribership, or
8 royalty fees that's an average for a broadcast,
9 and you take that average and you multiply it by
10 the volume of broadcasts and that gives you your
11 answer. So it's methodologically similar in that
12 sense.

13 Q Now, when you prepared your written
14 direct statement in this matter, did you
15 represent your various calculations in different
16 charts and tables and things like that?

17 A I did.

18 Q And I think, as I recall, they were
19 within the report, itself, correct?

20 A Some are in the report and some are in
21 exhibits.

22 Q Correct.

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1 A I don't know what you call --
 2 MR. BOYDSTON: May I approach, Your
 3 Honor?
 4 JUDGE BARNETT: You may.
 5 MR. BOYDSTON: Let me ask you to take
 6 a look at the our exhibit binders here, and let
 7 me direct your attention to what's been marked as
 8 Exhibit 126, and I believe, that's your
 9 curriculum vitae, correct?
 10 DR. ROBINSON: Yes.
 11 MR. BOYDSTON: Your Honor, I'd like to
 12 move that Exhibit 126 be admitted.
 13 MR. MACLEAN: No objection.
 14 MR. OLANIRAN: No objection.
 15 JUDGE BARNETT: 126 is admitted.
 16 Whereupon, the document previously
 17 marked as IPG's Exhibit 126 for identification
 18 was received into evidence.)
 19 MR. BOYDSTON: Thank you, Your Honor.
 20 Now, following Exhibit 126, Exhibits 127 through
 21 140 are photocopies, essentially, or
 22 reproductions of the exhibits that were in your

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1 amended, or in your written direct statement and
 2 your amended direct statement.
 3 Could you just take a minute to look
 4 through 127 to 140, just to recognize, or not
 5 recognize, be that is the case, that those are
 6 the exhibits that were, the exhibits and charts
 7 that were in your direct statement.
 8 DR. ROBINSON: Yes, it looks correct.
 9 BY MR. BOYDSTON:
 10 Q Now, at some point, did you update
 11 those?
 12 A Yes.
 13 Q Actually, but these were the originals
 14 before the updates, correct?
 15 A Right. There was, these say amended
 16 on them, so I'm thinking that they're from my
 17 amended report, as opposed to my first report.
 18 Q Understood. So these were the, when
 19 I said original what I meant was these were the
 20 exhibits and charts that were in your written,
 21 amended written direct statement, correct?
 22 A Yes.

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1 Q Thank you.
 2 MR. BOYDSTON: Your Honor, I'd like to
 3 move that Exhibits 127 through 140 be admitted.
 4 MR. MACLEAN: Can I have just one
 5 second?
 6 JUDGE BARNETT: You may. Meanwhile,
 7 MPAA?
 8 MR. OLANIRAN: We have no objections
 9 to the admission, subject to our written
 10 objections and the discussions that we had
 11 earlier this morning.
 12 JUDGE BARNETT: Thank you. 127
 13 through 140, correct?
 14 MR. BOYDSTON: Yes, Your Honor.
 15 JUDGE BARNETT: Oh, hang on, I'm still
 16 waiting for Mr. MacLean.
 17 MR. BOYDSTON: Right.
 18 (Off the record comments.)
 19 MR. MACLEAN: Subject to written
 20 objections.
 21 JUDGE BARNETT: Thank you. Exhibits
 22 127 through 140 inclusive are admitted subject to

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1 resolution of pending written objections.
 2 (Whereupon, the documents previously
 3 marked as IPG's Exhibits 127 through 140 for
 4 identification were received into evidence.)
 5 MR. BOYDSTON: Thank you, Your Honor.
 6 Now, those were in the amended statement, as we
 7 just discussed. After that, was there, I think
 8 there were, there's at least, after that they
 9 were, these exhibits were updated again, correct?
 10 DR. ROBINSON: Yes, in my rebuttal
 11 report.
 12 BY MR. BOYDSTON:
 13 Q Let me ask you to take a look at, it's
 14 going to be in the other binder, Exhibit 164
 15 through 179, and I believe, when you did this
 16 update you divided up the subject matter between
 17 cable and satellite issues, is that correct?
 18 A Yes.
 19 Q And so that group I just mentioned,
 20 164 to 179, are those updated exhibits from the
 21 original, or from the amended statement, but only
 22 for cable?

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1 A Yes.

2 Q And turning to Exhibit 171, and 172,

3 but we'll start with 171, Exhibit 171 appears to

4 be, well, a summation, it's entitled summary, a

5 summation of your analysis at that time that this

6 was prepared of the IPG share of relevant market

7 value, is that correct?

8 A Yes.

9 Q And then 172 is a breakdown of that,

10 I suppose, is that fair to say, or a

11 specification of that?

12 JUDGE BARNETT: Instead of telling her

13 what it is, how about you just ask her to

14 describe what it is, Mr. Boydston.

15 MR. BOYDSTON: Thank you, Your Honor.

16 Describe what Exhibit 172 is.

17 DR. ROBINSON: So Exhibit 171 lays out

18 each of these three factors that we've been

19 discussing, which here are in the B, C, and D,

20 columns, it tells you the average per broadcast.

21 And then, Column A tells you the IPG's

22 share of hours. And you could multiply this

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1 share of hours by the factors and get a range.

2 And so if you look at the Column E of Table 8,

3 that is, basically, what's reflected in Table 9

4 in the main section.

5 MR. BOYDSTON: I'm sorry, Table 9 is?

6 DR. ROBINSON: In the main section

7 here.

8 MR. BOYDSTON: All right.

9 DR. ROBINSON: And I simply, I

10 provided a midpoint, as well.

11 JUDGE STRICKLER: Excuse me, Dr.

12 Robinson, so you, on 171 you have Column E, which

13 is a range, these are ranged of the lowest to the

14 highest. If you took, let's take your 2004, for

15 example, the first line, so at 3.5 percent times

16 whichever is the lowest, 64.9 percent, that's the

17 starting point of your range in Column E, and

18 then the 3.5 percent times 177.32 percent gets us

19 to the 6.05 percent on the other side of the

20 range?

21 DR. ROBINSON: Exactly.

22 JUDGE STRICKLER: Thank you.

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1 MR. BOYDSTON: And, I'm sorry, I'm not

2 sure if I caught this, or not, but then, what

3 does 172 depict?

4 DR. ROBINSON: It literally is just a

5 summary, which to some extent, is what's in

6 Column E, but it also adds the midpoint for

7 convenience.

8 MR. BOYDSTON: Okay. Now, since you

9 prepared these exhibits, have you further updated

10 them?

11 DR. ROBINSON: I have.

12 MR. BOYDSTON: But these exhibits you

13 prepared in connection -- strike that. Your

14 Honor, I'd like to move to admit Exhibits 164

15 through 179.

16 MR. MACLEAN: Objection, Your Honor.

17 Actually, maybe I should ask her a Voir Dire

18 question.

19 JUDGE BARNETT: You may.

20 MR. MACLEAN: Dr. Robinson, these

21 exhibits in, I'm sorry, what was the offer, 164

22 --

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1 MR. BOYDSTON: 164 through 179.

2 MR. MACLEAN: These exhibits 164

3 through 179, every one of these exhibits includes

4 calculations that include Envoy Productions

5 Programs and Envoy Promark programs in the

6 devotional category, is that right?

7 DR. ROBINSON: So these were done at

8 the time of my rebuttal, at which point my

9 recollection is that of the seven Envoy Promark

10 titles that were described in the text of the

11 ruling, six went to the program suppliers, one

12 went to devotional, and the other titles that

13 were not part of those seven remained in

14 devotional.

15 MR. MACLEAN: And every single one of

16 those exhibits includes those not among those

17 seven titles Envoy Programs in your calculations

18 in the devotional category, correct?

19 DR. ROBINSON: Well, I'd have to look

20 at each one to see whether or not the data were

21 relevant to that exhibit, but if the data were

22 relevant to the exhibit, then yes.

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1 MR. MACLEAN: In other words, if the
2 programs that IPG was claiming was relative then
3 those programs would include Envoy in the
4 devotional category?

5 DR. ROBINSON: Yes. In those Envoy
6 programs, as I just described it, yes.

7 MR. MACLEAN: Your Honor, on that
8 basis, I object to the admission of all these
9 exhibits. These are the still incorporate these
10 exhibits still incorporate Envoy Programming in
11 the devotional category. These numbers are
12 meaningless, because they don't take into account
13 the actual buttress of programming. That's my
14 objection, in addition to those objections that I
15 stated in the record.

16 MR. OLANIRAN: And we're not --

17 MR. BOYDSTON: But --

18 MR. OLANIRAN: I'm sorry.

19 MR. BOYDSTON: Go ahead.

20 MR. OLANIRAN: Similar objections,
21 Your Honor, for Exhibits 164 through 165 and 167
22 through 179, they reflect a calculations, which

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1 the exhibits you have before you now, but this
2 was part of the process of her calculations, so I
3 thought it was relevant.

4 JUDGE BARNETT: I don't see the point
5 of admitting any of these exhibits, since they've
6 all been superseded. Okay, your representation
7 to the Court is that the exhibits 253 et seq. are
8 the ones that you handed out, or distributed
9 today, are replacements?

10 MR. BOYDSTON: I did. Another thing
11 just came to mind, as we were discussing this,
12 and that is that to the extent that that I think
13 it might be constructive, I don't know, but it
14 may be something that the parties need to point
15 back to say well, this is what I figured first,
16 then this came up, and now it's changed to this,
17 it might be useful for comparison. Again, we've
18 always done it that way in the past, too, so when
19 you say, I had it a little bit as a pause in mind
20 is that something that may be a problem not
21 including in the entire institutional record, if
22 you will, the processes by which things were

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1 presume that the conflicting titles are ID'd.

2 JUDGE BARNETT: So, Mr. Boydston, my
3 question to you is, since these have all been
4 superseded, why are you offering them?

5 MR. BOYDSTON: Because in the past
6 that's what we've always done, Your Honor, so
7 that if the judges want to look back and see a
8 regression.

9 In fact, at one point it was even
10 requested, I believe, by Judge Strickler that the
11 updates were made and we had exhibits already in
12 the record that stayed there.

13 I, as far as I'm concerned, I don't
14 need to admit these, necessarily, I was doing it
15 because that's what we had done in the past, so
16 that there is a record, if you will, if it's to
17 interest to anyone, as to what was determined
18 first, then what was determined second, if there
19 were changes that were made, which there were,
20 and then the third. At the same time, that's the
21 only reason I'm offering it.

22 I can just discuss this and go with

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1 calculated.

2 JUDGE BARNETT: And all of these, you
3 say, were taken from her written, amended written
4 direct testimony?

5 MR. BOYDSTON: No they were --

6 JUDGE BARNETT: That was just
7 submitted?

8 MR. BOYDSTON: -- these were submitted
9 with her, at the same time as all exhibits were
10 submitted with rebuttal testimonies, but they are
11 updates that were in her amended direct
12 statement, except they're all specific to broken
13 out satellite and cable. That's why there's
14 twice --

15 JUDGE BARNETT: Mr. Olaniran?

16 MR. OLANIRAN: I appreciate Mr.
17 Boydston's effort, but the fact is the vast
18 majority of this exhibit's actually duplicated in
19 Dr. Robinson's written rebuttal testimony. So
20 I'm not really sure why we're offering them as
21 separate exhibits in the first place, let alone
22 the fact that they've been updated.

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1 MR. BOYDSTON: That's true, we've done
2 that because it's easier than hazing back through
3 the witness statements sometimes. That's why, so
4 we've always done it that way. And so -- so do
5 the other parties, sometimes.

6 JUDGE BARNETT: The objections are
7 sustained. Let's just go with what's accurate.

8 MR. BOYDSTON: Okay. Dr. Robinson,
9 I'll just direct your -- well, in regard to the
10 cable exhibits that are not admitted, of course,
11 I believe, there were corresponding satellite
12 exhibits at that same time, correct?

13 DR. ROBINSON: Correct.

14 BY MR. BOYDSTON:

15 Q And like the cable exhibits that were
16 not admitted, those were updated, the satellite
17 exhibits were updated as well, correct?

18 A Correct.

19 Q And let's --

20 A May I ask a question, though, because
21 there's a lot of exhibits here? So in my
22 rebuttal report I updated, well, not in the

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1 report, but at the time I did my rebuttal report,
2 I had a bunch of exhibits that related to my
3 rebuttal, and then exhibits, which were updates
4 of my direct exhibits.

5 Q I believe we're --

6 A So I'm assuming, at this point, we're
7 only talking about the update of the direct, is
8 that correct?

9 Q That's correct.

10 A Okay.

11 Q That's correct. Now, let us go to the
12 most recent updates of these documents.

13 MR. BOYDSTON: And, Your Honor, may I
14 approach?

15 JUDGE BARNETT: You may.

16 MR. BOYDSTON: And, please, just take
17 a look at those, generally. These are exhibits
18 that you brought with you this morning, correct?
19 And, Your Honor, I'll, for clarification, these
20 are exhibits which have now been marked Exhibits
21 253 through 283, which were brought this morning
22 and distributed this morning.

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1 JUDGE BARNETT: Thank you.

2 MR. BOYDSTON: And, Dr. Robinson, if
3 you could, just confirm to us that these are the
4 exhibits that you brought this morning that are
5 an update of the exhibits we were discussing
6 previously.

7 DR. ROBINSON: Yes they are.

8 MR. BOYDSTON: Okay.

9 JUDGE BARNETT: You said through 283?

10 MR. BOYDSTON: I did.

11 JUDGE BARNETT: Are you not including
12 284 at this time?

13 MR. BOYDSTON: Well --

14 JUDGE BARNETT: Oh, I'm sorry. I
15 misread, my apologies, I misread the handwriting.
16 It only goes through 283.

17 DR. ROBINSON: And 226?

18 MR. BOYDSTON: Well, yes. You also
19 brought an amended Exhibit 226, correct, that's
20 what we're now marking and calling for
21 identification 226A?

22 JUDGE BARNETT: Correct.

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1 MR. BOYDSTON: Thank you. Now, what
2 was, let me ask, and I mean this very generally,
3 and then we'll get into specifics. Obviously,
4 you amended these for a reason, what generally
5 was the reason for amending these documents?

6 DR. ROBINSON: Generally, the reasons
7 for amending this document, these documents, were
8 information provided to me about the claims, as
9 well as some heirs identified by Doctors Erdem
10 and Gray in their rebuttal statements.

11 BY MR. BOYDSTON:

12 Q Okay, thank you. Now, if we could,
13 let's turn to Dr. Gray's rebuttal report, have
14 you reviewed that?

15 A I have.

16 Q And in response to that, I believe,
17 you just indicated that you made some changes to
18 the charts, which were reflected in these most
19 recent charts, correct?

20 A Correct.

21 Q And these exhibits, these charts,
22 Exhibit 253 to 283, were updated by you and your

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1 staff, correct?

2 A Correct.

3 Q And to the best of your knowledge, are
4 they correct at this point?

5 A Well, they're correct, with respect to
6 what I did and what I intended to do. I did not,
7 these revisions do not include any revisions
8 related to what I understand to be still
9 disputed, or maybe no longer disputed, claims
10 between MPAA and IPG, so I didn't change the
11 treatment of that because I was not informed to
12 do so, but I certainly can do so, yes.

13 Q You're aware that motions have been
14 filed right before this proceeding regarding
15 that, correct?

16 A I'm aware it's an issue, I don't know
17 exactly how that --

18 Q Okay, thank you.

19 A -- that plays out.

20 MR. BOYDSTON: Your Honor, I'd like to
21 move to admit Exhibits 253 to 283.

22 MR. OLANIRAN: Same objections as our

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1 written motion and follow it up with that
2 discussion.

3 JUDGE BARNETT: Okay, thank you.

4 MR. MACLEAN: Subject to objections
5 that have been made and will be made, Your Honor.

6 JUDGE BARNETT: Thank you, 253 through
7 283 are admitted provisionally.

8 (Whereupon, the documents previously
9 marked as IPG's Exhibits 253 through 283 for
10 identification was received into evidence.)

11 JUDGE BARNETT: I don't know if we
12 admitted 226, do you remember --

13 MR. BOYDSTON: I was just going to,
14 sorry, I forgot.

15 JUDGE BARNETT: Oh, okay.

16 MR. BOYDSTON: And, Your Honor, I'd
17 like to move to admit Exhibit 226A, as well.

18 MR. OLANIRAN: Well, same objections.

19 MR. MACLEAN: No objection to 226A.

20 JUDGE BARNETT: 226A is admitted
21 provisionally and subject to MPAA's objection.

22 (Whereupon, the document previously

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1 marked as IPG's Exhibit 226A for identification
2 was received into evidence.)

3 MR. BOYDSTON: Thank you, Your Honor.
4 Now, Dr. Gray had a criticism of your approach
5 here, at Paragraph 4 of his report, and it said,
6 as described later in his testimony, because the
7 my methodology is applied to a more complete
8 data.

9 It is my opinion that my proposed
10 methodology provides a better approach to
11 allocate relative shares in the programs
12 supplier's category than Dr. Erdem's, in effect
13 you said Dr. Erdem's methodology, do you recall
14 that?

15 DR. ROBINSON: I do.

16 BY MR. BOYDSTON:

17 Q And what's your opinion of Dr. Gray's
18 assessment of Dr. Erdem's methodology?

19 A I agree with Dr. Gray that Dr. Gray's
20 methodology is more reliable than Dr. Erdem's
21 methodology.

22 Q With, Dr. Gray made a comment in

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1 Footnote 18 on Page 14 of his rebuttal that your
2 treatment of a Canadian-originated program called
3 Kenny versus Spenny was incorrect and should not
4 be compensable in the program supplier's
5 category, do you recall that?

6 A I do.

7 Q And what is your view of that
8 criticism?

9 A There are no broadcast of Kenny versus
10 Spenny that are incorporated into my analysis,
11 and I really don't know why Dr. Gray thinks there
12 is, but there are not.

13 Q And how is it that you know that it
14 wasn't incorporated into your analysis?

15 A Well, after I saw his rebuttal,
16 written rebuttal report, I went back to check and
17 the coding is correct and the results are
18 correct, in terms of it doesn't show up on the
19 data set on the things that are being computed.

20 Q And when you say the coding is
21 correct, why was it you were coding the codes, if
22 you will, to make it so that Kenny versus Spenny

93

1 would not be compensable, or would not be ,
2 included in your analysis?

3 A Because it was a Canadian-origin
4 program.

5 Q Dr. Gray has criticized your use of
6 the overlap that you described earlier, between
7 your random sample and his set of stations. I
8 think you've explained why you did it that way,
9 do you believe that Dr. Gray's objection, or
10 question, about that is meritorious?

11 A Well I think, I mean, pretty much as
12 I said before, it does cover a large portion of
13 the population. We could look at the tables, but
14 my recollection is about 85 percent, so there may
15 be an issue as to the, whether or not you can
16 make the same inferences for the remaining 15
17 percent, but the problem is sort of bounded by 15
18 percent of the population. And Dr. Gray did not,
19 in any case, in his rebuttal provide any analysis
20 showing that there was a problem with that 15
21 percent.

22 JUDGE STRICKLER: So the record is

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1 clear, when you say 85 percent and 15 percent, 85
2 percent and 15 percent of what?

3 DR. ROBINSON: It would help if I
4 could look at the report to make sure I answer
5 precisely.

6 JUDGE STRICKLER: Yes, sure.

7 MR. BOYDSTON: Okay, I'm just going to
8 --

9 (Simultaneous speaking.)

10 JUDGE BARNETT: You may.

11 MR. BOYDSTON: All right, this is Dr.
12 Gray's rebuttal.

13 JUDGE STRICKLER: Thank you. Rebuttal
14 to which party? Because you have two rebuttals,
15 right?

16 MR. BOYDSTON: Right, Dr. Gray only
17 had one.

18 MR. MACLEAN: He only had one.

19 (Off the record comments.)

20 JUDGE STRICKLER: Oh, Dr. Gray's
21 rebuttal. I'm sorry.

22 MR. MACLEAN: 337.

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1 JUDGE STRICKLER: Thank you.

2 MR. BOYDSTON: There at, yes.

3 JUDGE STRICKLER: I'm at 337 to 347.

4 (Off the record comments.)

5 MR. BOYDSTON: That was his, correct.

6 JUDGE STRICKLER: Okay.

7 MR. BOYDSTON: Here is Dr. Gray's
8 rebuttal and I put out the page reference.
9 Paragraph 27, yes, Paragraph 27 was where he made
10 the observation.

11 MR. OLANIRAN: Your Honor, just for
12 the record, Dr. Gray's rebuttal testimony is
13 actually not in the record, yet, if --

14 DR. ROBINSON: Yes, I'd be just as
15 happy to look at my own report.

16 JUDGE STRICKLER: I mean, what happens
17 if we move it now, if there's no objection?

18 MR. BOYDSTON: Well, Your Honor, this
19 is our only chance, giving the way the timing
20 works, this is the only chance she has to
21 respond. I'm assuming they're going to admit it
22 later on, if they don't then, you know, fine.

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1 JUDGE BARNETT: Well, Mr. Olaniran is
2 requesting that it be admitted at this time, any
3 objections Mr. MacLean?

4 MR. MACLEAN: No objections.

5 JUDGE BARNETT: I assume you don't
6 object, Mr. Boydston?

7 MR. BOYDSTON: Yes, subject to our
8 previous motions, yes.

9 JUDGE BARNETT: Okay.

10 MR. OLANIRAN: And that would be
11 Exhibit MPAA to the --

12 (Off the record comments.)

13 MR. OLANIRAN: -- 373.

14 JUDGE BARNETT: Exhibit 373 is
15 admitted.

16 (Whereupon, the document previously
17 marked as MPAA's Exhibit 373 for identification
18 was received into evidence.)

19 MR. OLANIRAN: Thank you, Your Honor.

20 (Off the record comments.)

21 DR. ROBINSON: I think it would be my
22 direct report.

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1 JUDGE STRICKLER: Right.
 2 DR. ROBINSON: I'm pretty sure that
 3 the answer is the percentage of this is
 4 subscribers that are left in the sample.
 5 JUDGE STRICKLER: Thank you, but
 6 you'll want to confirm, since we've gone through
 7 all this.
 8 DR. ROBINSON: Yes.
 9 JUDGE FEDER: Well, Counsel, once you
 10 look for whatever it is you're looking for, I do
 11 have one question to clarify about.
 12 MR. BOYDSTON: Of course.
 13 JUDGE FEDER: The comedian program
 14 that you mentioned before, you said it was
 15 Canadian-origin, did you mean that the broadcast
 16 was originated in Canada, or that the program is
 17 Cana?
 18 DR. ROBINSON: That the broadcast
 19 originated in Canada.
 20 JUDGE FEDER: Okay, thank you.
 21 JUDGE STRICKLER: What have you put
 22 before the witness?

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1 MR. BOYDSTON: I'm sorry, the witness'
 2 direct testimony, Your Honor.
 3 JUDGE STRICKLER: Supplemented the
 4 original one?
 5 MR. BOYDSTON: I beg your pardon,
 6 there are two of them, you're right and I forgot
 7 them.
 8 (Off the record comments.)
 9 MR. BOYDSTON: That's what I'm trying
 10 to get out.
 11 JUDGE STRICKLER: Her supplemental is
 12 in your amended direct statement, if I remember
 13 correctly.
 14 MR. BOYDSTON: Yes.
 15 JUDGE STRICKLER: We had one, but -
 16 JUDGE BARNETT: I think I'm just
 17 looking for the original direct, though.
 18 MR. BOYDSTON: This is just him.
 19 JUDGE BARNETT: Okay.
 20 MR. BOYDSTON: There were, yes, there
 21 was one in the programs category, which is what
 22 you have and one in the devotional category.

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1 MR. MACLEAN: I think that's right.
 2 I was thinking of a specification --
 3 (Off the record comments.)
 4 MR. BOYDSTON: Your Honor, I beg your
 5 pardon. I've gotten a bit mixed up.
 6 MR. MACLEAN: We'll get there.
 7 MR. BOYDSTON: And you said you wanted
 8 the direct?
 9 DR. ROBINSON: Yes, the first --
 10 MR. BOYDSTON: Yes, this is the
 11 direct.
 12 DR. ROBINSON: -- report I ever wrote.
 13 MR. BOYDSTON: This is the direct. I
 14 was not mixed up, actually.
 15 DR. ROBINSON: Okay.
 16 JUDGE FEDER: Okay, and which direct?
 17 Yes, so the record's clear, what --
 18 MR. BOYDSTON: Yes.
 19 JUDGE FEDER: -- what did you just
 20 give the witness?
 21 MR. BOYDSTON: I gave the witness her
 22 written direct testimony, not --

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1 DR. ROBINSON: For cable.
 2 MR. BOYDSTON: Written direct
 3 testimony.
 4 JUDGE FEDER: For?
 5 DR. ROBINSON: Cable.
 6 JUDGE FEDER: Cable, thank you.
 7 JUDGE BARNETT: Would you refresh my
 8 recollection regarding the question?
 9 MR. BOYDSTON: I just did that myself.
 10 JUDGE BARNETT: I know it had
 11 something to do with Dr. Gray, but I --
 12 MR. BOYDSTON: Yes, Your Honor, I was
 13 just doing that myself, I asked her --
 14 JUDGE STRICKLER: I think it was my
 15 question that prompted all this, actually, not
 16 yours.
 17 (Simultaneous speaking.)
 18 MR. BOYDSTON: Yes.
 19 JUDGE STRICKLER: My question was
 20 based on the fact that Dr. Robinson said that
 21 when she combined the two samples, she was
 22 covering 85 percent, and I said 85 percent of

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1 what? And she said good, in effect, good
2 question, can I see my written testimony? And
3 then we were off to the races.
4 MR. BOYDSTON: Yes. Yes. I believe
5 it was at Page 8 on Table 3, perhaps, that there
6 was a clarification.
7 DR. ROBINSON: You know what, it's not
8 going to be in the direct, because I didn't have
9 Dr. Gray's information at that point.
10 MR. BOYDSTON: Right.
11 DR. ROBINSON: So this is just telling
12 me my, that the stratified, but it's probably in
13 the amended, is that in here also?
14 (Off the record comments.)
15 MR. BOYDSTON: It's not that Table 3
16 then? I shouldn't have asked. I --
17 (Off the record comments.)
18 JUDGE BARNETT: It's six minutes
19 early, but we'll take our Noon recess and then
20 people can all shuffle documents during this
21 recess, Ms., excuse me, Dr. Robinson, please
22 don't consult with Counsel.

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1 DR. ROBINSON: Okay.
2 JUDGE BARNETT: So we'll be at recess
3 until 12:55 p.m.
4 (Whereupon, the above-entitled matter
5 went off the record at 11:52 a.m. and went back
6 on the record at 1:08 p.m.)
7 MR. BOYDSTON: Your Honor, during the
8 break, we had a discussion amongst counsel. We
9 have our other witness, the only witness we have
10 other than Ms., Dr. Robinson, is Michael Egan,
11 and he is here.
12 He's going to be a relatively short
13 witness, and so our thought is since we're not
14 really that deep into Dr. Robinson, and that we
15 put on Mr. Egan now, and have him examined and
16 cross examined, and then the MPAA has two
17 witnesses it would like to call, that if they're
18 allowed to testify would be shorter as well, and
19 so after that we'll deal with that.
20 Then we'll go back to Dr. Robinson,
21 who's going to be a longer affair.
22 JUDGE BARNETT: Okay, thank you. This

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1 is by consent, counsel?
2 MR. MACLEAN: Yes, Your Honor.
3 MS. PLOVNICK: Yes, Your Honor.
4 JUDGE BARNETT: Before we start with
5 Mr. Egan, are you Mr. Egan?
6 MR. EGAN: Yes, I am.
7 JUDGE BARNETT: Come right up here,
8 and Ms. Whittle going to read into the record the
9 exhibit number changes.
10 MS. WHITTLE: Actually, I was just
11 going to mention that yesterday, four exhibits
12 that were admitted that were just in the docket
13 and I assigned the numbers. So No. 250 is the
14 amended, written, direct testimony of Mr. Galaz.
15 (Whereupon, the above-referred to
16 document was marked as IPG Exhibit No. 250 for
17 identification.)
18 MS. WHITTLE: No. 251 is the rebuttal
19 testimony of Mr. Galaz regarding the SDC.
20 (Whereupon, the above-referred to
21 document was marked as IPG Exhibit No. 251 for
22 identification.)

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1 MS. WHITTLE: No. 252 is the rebuttal
2 testimony of Mr. Galaz regarding MPAA, and that's
3 it.
4 (Whereupon, the above-referred to
5 document was marked as IPG Exhibit No. 252 for
6 identification.)
7 MS. WHITTLE: I'm sorry. 249 is the
8 written, direct testimony of Mr. Galaz.
9 (Whereupon, the above-referred to
10 document was marked as IPG Exhibit No. 249 for
11 identification.)
12 JUDGE BARNETT: Thank you. Mr. Egan,
13 if can raise your right hand.
14 Whereupon,
15 MICHAEL EGAN
16 was called as a witness and, after having been
17 first duly sworn, was examined and testified as
18 follows:
19 MR. BOYDSTON: Your Honor, just before
20 I begin, I think I'd just like to ask whether or
21 not there are witnesses in the courtroom. I just
22 think I recognize Ms. Jane Saunders, who's in the

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1 -- not the courtroom, in our room. I can't
2 remember what we call it.
3 JUDGE BARNETT: Hearing room.
4 MR. BOYDSTON: Hearing room, thank
5 you. I think we usually don't have witnesses who
6 may be testifying in the future sitting in during
7 other witness' testimony.
8 JUDGE BARNETT: Nobody moved to
9 exclude witnesses.
10 MR. BOYDSTON: Okay.
11 MS. PLOVNIK: She is party
12 representative, and that is always permitted even
13 witnesses are sequestered.
14 JUDGE BARNETT: Fair enough, okay.
15 MR. MACLEAN: Very well. Your Honor,
16 the SDC moves to sequester witnesses, but of
17 course we acknowledge that Ms. Saunders is a
18 party.
19 JUDGE BARNETT: Okay, thank you. Mr.
20 Egan, if you begin please by spelling your name
21 for the record.
22 THE WITNESS: Sure. Michael, M-I-C-H-

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1 A-E-L, Egan, E-G-A-N.
2 JUDGE BARNETT: Thank you.
3 DIRECT EXAMINATION
4 MR. BOYDSTON: Good afternoon, Mr.
5 Egan. My name is Brian Boydston. I'm the
6 attorney for Independent Producers Group. Could
7 you please give us, just briefly tell us about
8 your educational and professional background.
9 MR. MACLEAN: I'm sorry. Your Honor,
10 I don't believe the witness has been sworn.
11 JUDGE BARNETT: He was when you
12 weren't paying attention.
13 MR. MACLEAN: Okay. I'm very sorry,
14 Your Honor.
15 JUDGE BARNETT: It's okay. I'll let
16 you off on this one.
17 THE WITNESS: Sure. Educationally, I
18 have a B.A. in English and a Master's degree in
19 Radio, Television and Film from the Newhouse
20 School of Public Communications, Syracuse
21 University, and then a whole bunch of other
22 graduate work from the New School in New York

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1 City.
2 Professionally, I've been working in
3 the cable -- or I spent two years as a high
4 school English teacher, another year or so
5 working in radio, and then I spent over -- I hate
6 to even say, 35 years working in the cable
7 television business, first on the programming
8 side, producing programming for an independent
9 television production firm in New York City, and
10 then eventually moving to cable system owner-
11 operator, and often group owners in the cable
12 business refer to MSOs, multiple system owners.
13 That's sort of the term of art, and so
14 I'll use that, I'm sure, because it rolls off my
15 tongue easily. I worked for an MSO called
16 Cablevision Industries. I worked there for about
17 15 years, 1980 to early '96, and during my time
18 Cablevision grew from a small cable company based
19 in upstate New York, or what New York City people
20 think of as upstate New York.
21 Those who live there think of it as
22 downstate, but it's kind of in the middle, and

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1 based in Liberty, New York, and it was a small
2 company. It had 38,000 subscribers at the time I
3 joined it, but I knew that it was going to grow
4 because of the man who owned it and also the way
5 that a table was set for the business.
6 So I joined in 1980, and we did grow
7 eventually to almost a million-three subscribers,
8 which at the time was a very large cable company.
9 By today's standards, the way things have gone
10 through consolidation, it's not that big. But
11 back then, it was the eighth largest cable
12 company, and actually the largest independent or
13 I should say private cable company.
14 And so CVI, that's how Cablevision was
15 known, my initial and primary responsibility was
16 programming, and this is when all the networks
17 were happening, being born, whether it was CNN,
18 MTV, you know.
19 Nonetheless, this is when the ones
20 that you know best were created, and so my job as
21 the programming president was to figure out what
22 we're going to do with these things, negotiate

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1 the deals, the affiliation agreements and so on
2 and so forth.

3 I also had responsibility for business
4 development, and believe it or not at that time,
5 pay-per-view was a new business that we created
6 on my watch and advertising sales and all sorts
7 of things.

8 So I got the responsibility for those
9 as well, as well as marketing, and I was a member
10 of the senior management team there. We had a
11 small group of men and women at corporate who
12 decided on acquisitions, you know, purchasing
13 cable systems, building, franchising, borrowing
14 and so on and so forth.

15 So CVI became a very big, well-known
16 cable company. Then CVI was sold to Time Warner
17 Cable in that deal closed in January of 1996,
18 and at that time, I and five other people from
19 CVI formed another MSO called Renaissance Media,
20 and they were partnered up eventually with Morgan
21 Stanley Capital Partners, and went out and bought
22 eight cable systems.

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1 So that's -- when I finally bought
2 those systems, it was '98, and again at
3 Renaissance I had, you know, the specific
4 responsibility for all of the things I mentioned
5 before, programming, all retransmission consent
6 negotiations, must-carry, copyright,
7 administration, all of the arrangements with
8 satellite networks and broadcast TV stations, as
9 well as advertising sales pay-per-view.

10 And then, because there was a small
11 group of us, we were all jointly responsible for
12 everything, including the relationship with
13 Morgan and raising money.

14 We sold that company to Charter
15 Communications in 1999, when Charter was buying
16 everything it could buy, and we basically
17 couldn't compete with them, because they were
18 backed by Paul Allen, and whatever anybody was
19 willing to bid for a cable system, he'd just say
20 85 percent and that was that.

21 And so then we sold Charter, and I
22 went out on my own then doing consulting work.

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1 So for the last, I guess almost 15 years, I've
2 had a consulting company called Renaissance Media
3 Partners. I bring on other colleagues as I need
4 them, and I do strategic consulting work for both
5 MSOs, large MSOs, Time Warner Cable, Comcast,
6 Cablevision/Charter, as well as smaller cable
7 operators, and Centennial Cable, Cumberland
8 Cable.

9 Then I also do similar but different
10 work for the programmers as well, Rainbow
11 Programming, AMC Networks, Good Life TV, ESPN and
12 so on and so forth, all dealing with programming
13 matters, the business side of programming for the
14 most part.

15 And as you I'm sure are aware, the
16 dollars are enormous. So it's a big business,
17 and sometimes they need help. I also have done
18 work for technology companies trying to get into
19 the cable space, other content owners and
20 licensors as well.

21 I've done significant -- a substantial
22 amount of work as an expert witness for some of

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1 these companies as well, both private litigation
2 as well as a number of FCC matters in program
3 carriage complaints, and involved in one of those
4 right now.

5 Q Your Honor, before I proceed, Mr. Egan
6 asked about some water. May I approach?

7 JUDGE BARNETT: Sure.

8 BY MR. BOYDSTON:

9 Q Thank you.

10 A Certainly.

11 Q Mr. Egan, I think you testified that
12 -- you just mentioned I think at the end of your
13 statement there that you've testified before in
14 different legal matters; correct?

15 A Yes.

16 Q And are you familiar with an entity
17 called the Joint Sports Claimants?

18 A Yes sir.

19 Q And have you testified on their
20 behalf?

21 A I have. I think it was in 2003,
22 somewhere around there, testified before the CARP

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1 and I was an expert witness for the Joint Sports
2 Claimants, and that was the '98-'99, I guess,
3 Phase 1 of the '98-'99 cable royalties case.

4 Q I think I heard you mention the FCC,
5 but I'm not positive. Have you also testified in
6 front of the FCC?

7 A I've testified in front of the FCC
8 multiple times, as an expert witness for Time
9 Warner Cable, Comcast Cable, Cox Cable and Bright
10 House Cable I think would be those. Specific
11 cases, Tennis Channel was a program carriage
12 complaint, a case that took on a life of its own.
13 It was a complaint, a program carriage complaint
14 against Comcast. So I testified in that.

15 The first one I did was Wealth TV.
16 Herring Broadcasting owned Wealth TV versus four
17 cable companies. Initially, I was there for a
18 witness for just one of them, Time Warner Cable.
19 But then as it moved along, the other three
20 defendants adopted my testimony.

21 So I was the programming expert for
22 all of them, and also in Bloomberg Television

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1 versus Comcast, and right now I'm involved and
2 have been involved and continue to be involved in
3 another one, a program carriage complaint by the
4 Gannett Show Network versus Cablevision Systems.

5 Q Thank you. What is it that you've
6 been asked to do in this proceeding?

7 A So I was asked to do two things. One
8 is to explain to the judges the factors that
9 cable television system owner operators consider
10 when making programming decisions, how they value
11 networks and stations, and then second, to
12 respond as appropriate to the testimony of
13 another expert witness for the Settling
14 Devotional Claimants, Toby Berlin.

15 Q Thank you. Based upon your experience
16 and the testimony you were describing in other
17 matters, do you consider yourself to be an expert
18 in MSO operations?

19 A I do.

20 Q And do you consider yourself to be an
21 expert in MSO programming and decision-making?

22 A I do.

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1 MR. BOYDSTON: Your Honor, I'd like to
2 move to designate Michael Egan as an expert in
3 MSO operations and MSO programming and decision-
4 making.

5 MR. MACLEAN: No objection.

6 MS. PLOVNICK: No objection.

7 JUDGE BARNETT: Mr. Egan is so
8 qualified.

9 BY MR. BOYDSTON:

10 Q And within that, Mr. Egan, let me ask
11 this one follow-up question. Well, strike that.
12 Let's turn first to factors regarding cable
13 system operators' decision-making process, when
14 they're evaluating whether or not to pay a
15 compulsory license for the distant retransmission
16 of a television station.

17 You're familiar with that, I think, is
18 obvious from your testimony; correct?

19 A Yes, I am.

20 Q Before we go any further, very quickly
21 if I could approach, Your Honor.

22 JUDGE BARNETT: You may.

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1 MR. BOYDSTON: If I could ask you to
2 take a look at what's been marked as Exhibit 156.
3 Binders starting to pile up on each other. If I
4 can ask you take a look at that. Is that your
5 curriculum vitae?

6 (Whereupon, the above-referred to
7 document was marked as IPG Exhibit No. 156 for
8 identification.)

9 THE WITNESS: Yes, it is.

10 MR. BOYDSTON: Your Honor, I'd like to
11 move to admit Exhibit 156.

12 MR. MACLEAN: No objection.

13 MS. PLOVNICK: No objection.

14 JUDGE BARNETT: 156 is admitted.
15 (Whereupon, the above-referred to
16 document was received into evidence as IPG
17 Exhibit No. 156.)

18 BY MR. BOYDSTON:

19 Q Thank you, Your Honor. Excuse me.
20 Now if you tell us, in your experience when a
21 system operator is making decisions about what
22 distant retransmission signals or stations, I

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1 should say, it wants to pay a license for, what
2 are the factors that the system operator
3 considers?

4 A Well essentially, excuse me,
5 essentially they're the same as when a cable
6 operator and, to my understanding, a satellite
7 operator, considers any programming. It's really
8 the same consideration, and so it will be a
9 little longer answer than you might have
10 expected, but it's needed.

11 So the cable -- a cable system and a
12 satellite system are multi channel distributors.
13 That's what they do, and they need hundreds and
14 hundreds of channels, and some that aren't even
15 channels, that are just on demand. They don't
16 have a channel number assigned to them, but you
17 can go in and demand it.

18 You know, when I started there, it was
19 a good day when a cable system had 20 channels,
20 and now it's hundreds of channels. It's a rather
21 remarkable change, and the channels for the most
22 part are bundled at the packages. So basic

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1 ancillary business.

2 So as a result, what the decision
3 makers are looking at is when I'm going to add a
4 channel or considering adding a channel, how is
5 that going to affect my subscriber revenues.
6 That's the number one, number two and number
7 three question.

8 The elements or the factors that
9 affect subscriber revenues are categorized as
10 either subscriber acquisition. We're going to go
11 gain subscribers or we're going to gain units of
12 a tier that we offer, an optional tier, or
13 retention. We'll hold on to these customers, in
14 spite of competition or whatever.

15 So you know, that's what it boils down
16 to, those two analyses. Again, the term of art
17 that cable and satellite operators throw around
18 is subscriber satisfaction. You know, is this
19 going to please my subscribers when I add those
20 in. So that's the overall rubric that is in
21 place.

22 Now the specific factors, when you're

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1 cable, family tier, gold, whatever you want to
2 call it, and you get a whole bunch of channels.

3 As a result, and for them, and the way
4 the customer pays for those, is on a subscription
5 basis, and it's a monthly subscription for the
6 most part. There are instances when people sign
7 a year long deal or something for a discount.
8 But it's essentially month to month subscription.

9 And as result, subscriber revenues for
10 those packages is the be-all and end-all of a
11 multi-channel distributor's P&L and fortune, and
12 you know, to put some numbers to that, a typical
13 cable system, an MSO, generates more than 90
14 percent is video revenues from subscription
15 revenues, and less than ten percent from
16 advertising sales, okay.

17 For this case, I looked at for the
18 first time DirecTV, and it's even more so in the
19 case of DirecTV. Ninety-eight percent of
20 DirecTV's video revenues come off subscription
21 revenues. So that's where their focus starts and
22 ends. Advertising sales is a nice little

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1 looking at programming service, whether it's a
2 distant television or a cable network or anything
3 else, is as they say, going to be how is it going
4 to affect my subscriber acquisition, my
5 subscriber retention.

6 The elements you look at are number
7 one, the economics, and I'll go through each of
8 them. Economics, programming, those are the two
9 primary. Competitive offerings out there; my
10 strategic initiatives. What am I trying to
11 achieve, what am I trying to do, and customer
12 requests.

13 So now we want to explain those. So
14 the primary two, are economics and programming.
15 So economics. What does that mean? It's very
16 simple. It's the license fee, the cost of
17 carrying the programming. Everything we watch on
18 television, eventually everything costs, you
19 know. The satellite or cable guy is paying for
20 it.

21 And so it's commonly called the
22 license fee, but it could be a retransmission

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1 consent fee, and of course it could be a
2 copyright fee attached. So what is it costing to
3 carry this, and you know, it's easy when things
4 cost, you know, ten cents or 20 cents or 40
5 cents to think how meaningful is that really? I
6 mean you know, you're charging me \$100 a video.
7 How meaningful is a license fee of 40 cents
8 really?

9 Well you know what? It's really
10 meaningful, because they're carrying hundreds of
11 channels. So it adds up big time, and if the
12 increase going forward on the average is ten
13 percent, well that's, in a typical cable system,
14 that's four hours of increase year to year, just
15 for license fees, not to mention new trucks and
16 giving people raises and heat and everything
17 else.

18 So it's very meaningful, and so cable
19 operators and satellite operators have a really
20 difficult task of managing this, and trying to
21 keep license fees from rising any higher than the
22 rate of inflation. You don't want to pass it

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1 ratings, and whether or not ratings play a
2 significant part in a multi-channel system
3 operator's decision-making, you started to
4 explain one reason why that wasn't the case. Are
5 there other reasons?

6 A Are there other reasons. They're just
7 a minor factor. They're not going to make a
8 different between a customer coming to your
9 system or not, or leaving, because there's
10 hundreds of channels. The important thing that a
11 cable or satellite operator is looking for is the
12 added value.

13 What's on this channel that is going
14 to make a difference, that's going to stand out
15 from the other 400 channels on there, and that is
16 again obvious, if you think about it,
17 exclusivity. Maybe this channel has the NFL, and
18 nobody else does, or you know, very little does.
19 Maybe it's got music videos, which nobody else
20 has. Maybe it has politics and live coverage of
21 the Congress or the Senate, and nobody else does.

22 Maybe it's got programming for

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1 through to customers, because that now begins to
2 impact customer satisfaction, and therefore
3 customer retention, customer acquisition. So
4 economics is critical.

5 Programming seems obvious, but you
6 know, there's a lot of stuff out there that you
7 might carry. And so the question is when you're
8 looking at a cable network, is what's its unique
9 value? What is it adding? If I didn't have 400
10 channels on, what difference can one more make,
11 really, to my bundles that I'm selling, right?

12 In this case, I know it's been
13 suggested that ratings are a primary factor
14 there. They're not, they're just not, because
15 when you think about it, most of these cable
16 networks, their ratings are .15, .2. That's two-
17 tenths of one percent.

18 MR. MACLEAN: Objection, narrative.

19 JUDGE BARNETT: Sustained. Ask
20 another questions, Mr. Boydston.

21 BY MR. BOYDSTON:

22 Q Thank you, Your Honor. With regard to

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1 children, maybe it's got programming for women.
2 These are niches. That's what makes the
3 difference. So then a cable or satellite
4 operator will say okay, that's going to add value
5 to my bundle here. That's going to add
6 programming, you know, content that maybe someone
7 else in the household's going to watch, and my
8 bundle becomes stickier.

9 So when DirectTV knocks on the door of
10 my cable subscriber and says hey, I've got a deal
11 for you, the customer's going to say you know,
12 I'm happy where I am. So programming is a
13 critical, critical factor, and that same logic
14 applies to distant television stations.

15 So if I'm a cable system thinking
16 about importing a distant station into my local
17 market of my cable system, I'm going through the
18 same equation. What are the economics? What's
19 it going to cost me in a retransmission consent
20 fee with this station? What it's going to cost
21 me on a copyright payment?

22 What is it going to cost? What's the

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1 programming value, right? Typically it's sports.
2 You know, that's live sports. In spite of all
3 the changes in television, live sports remains,
4 you know, a primary mover. Movies used to be
5 real important; not that important anymore,
6 because there's hundreds of channels of movies on
7 cable.

8 News from an adjoining region. I
9 operated a cable system in a lot of -- a lot of
10 cities and so forth, but also a lot of areas that
11 are just outside of cities or they're in between
12 two cities, and the ability to get news from
13 Wilkes Barre/Scranton in the New York market
14 might be important to people that live on that
15 edge, because they're from Wilkes-Barre/Scranton.

16 So you know, local news from an
17 adjoining market might be important. Public
18 affairs coverage from the state capitol. In my
19 testimony, I cite as an example of Renaissance
20 Media cable system and we owned and operated. It
21 was in and around Jackson, Tennessee.

22 Jackson's a small market and it's also

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1 A No. In all of my times of doing this,
2 hundreds of cable systems, hundreds of TV
3 stations, and then as an owner operator and then
4 consulting for Time Warner Cable, a giant
5 retransmission consent writer, I don't remember
6 once remember ratings coming up. I'm not saying
7 it doesn't happen somewhere. It hasn't happened
8 in my experience.

9 It's just unknown, you know. The
10 question is what's on the station. Oh, it's the
11 -- like I say, in Jackson, Tennessee we imported
12 Nashville stations. They were distant stations,
13 but we imported them because they had coverage of
14 the state capitol. We already had the networks
15 on from Memphis and Jackson, but we were willing
16 to pay the fee, because it brought something,
17 some added value.

18 Q And when you did that, did you look at
19 what the ratings were from Nashville, where they
20 had the state capitol news?

21 A I had no idea what they were, no.

22 Q Let me ask you -- actually, before I

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1 in the local market for the --

2 MR. MACLEAN: Objection.

3 JUDGE BARNETT: Sustained. Ask
4 another question, Mr. Boydston.

5 BY MR. BOYDSTON:

6 Q Certainly. You gave the example of
7 people in New York City that might be interested
8 in a cable system that has news from the Wilkes-
9 Scranton area.

10 Now for the cable system or operator
11 who's trying to decide whether or not to import
12 that distant signal, you said that the interest
13 or the decision would bear on whether or not
14 there were people in or subscribers, rather, that
15 would be interested in that local news from
16 Wilkes-Scranton, because they might live near
17 there, something like that. Do you recall that
18 part of your testimony?

19 A Yes.

20 Q Now in making that decision, would the
21 cable system operator focus on what ratings that
22 Wilkes-Scranton channel got?

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1 do, you mentioned that you had looked up some
2 information about DirecTV, because it was your
3 understanding that advertising revenue played a
4 small role in multi-system operators; correct?

5 A Yes.

6 MR. BOYDSTON: Can I ask you to take
7 a look at exhibit, what's been marked as Exhibit
8 158?

9 (Whereupon, the above-referred to
10 document was marked as IPG Exhibit No. 158 for
11 identification.)

12 THE WITNESS: Yes.

13 BY MR. BOYDSTON:

14 Q And do you recognize this document?

15 A I do. It's the -- a spreadsheet
16 summary of DirecTV's revenues.

17 Q And is this where you got the
18 information that you recited in your testimony?

19 A It's where that happened, and so as
20 you can see for 2013, DirecTV US revenues were 24
21 point --

22 MR. MACLEAN: Objection. It's

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1 characterizing a document not in evidence.
 2 MR. BOYDSTON: I was getting there.
 3 JUDGE BARNETT: Okay. Just identify
 4 it and then offer it, Mr. Boydston.
 5 MR. BOYDSTON: Yes, Your Honor. Your
 6 Honor, I'd like to move to admit Exhibit 158.
 7 MR. MACLEAN: Subject to our written
 8 objection.
 9 JUDGE BARNETT: Certainly.
 10 MS. PLOVNICK: No objection.
 11 JUDGE BARNETT: 158 is admitted,
 12 subject to written objections.
 13 (Whereupon, the above-referred to
 14 document was received into evidence as IPG
 15 Exhibit No. 158.)
 16 BY MR. BOYDSTON:
 17 Q Mr. Egan, please continue explaining
 18 the significance you found in this document?
 19 A So Exhibit 158 was the revenues of
 20 DirecTV US as 24.7, rounding a bit, billion
 21 dollars for 2013.
 22 MR. BOYDSTON: And let me ask you to

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1 take a look at what's been marked Exhibit 159.
 2 You mentioned there were two documents regarding
 3 DirecTV that you looked at. Is this the other
 4 one?
 5 (Whereupon, the above-referred to
 6 document was marked as IPG Exhibit No. 159 for
 7 identification.)
 8 THE WITNESS: Yes, it is.
 9 MR. BOYDSTON: Your Honor, I'd like to
 10 move to admit Exhibit 159.
 11 MR. MACLEAN: Subject to our written
 12 objections.
 13 MS. PLOVNICK: We have no objection.
 14 JUDGE BARNETT: 159 is admitted,
 15 subject to written objections.
 16 (Whereupon, the above-referred to
 17 document was received into evidence as IPG
 18 Exhibit No. 159.)
 19 JUDGE STRICKLER: Excuse me, Mr.
 20 Boydston.
 21 MR. BOYDSTON: Yes.
 22 JUDGE STRICKLER: Interject for a

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1 second. Mr. Egan, I have a question for you.
 2 You talked about how ratings are not
 3 important, as far as you understand from your
 4 experience, and you also talked about how, when
 5 it's decided whether to do -- whether a station
 6 would be retransmitted into another market, a
 7 distant station would be retransmitted, one of
 8 the important elements is that it can, my words
 9 not yours, rebuff competition.
 10 So that when, I think your words, when
 11 the DirecTV guy comes knocking on the door, you
 12 say "No, as the customer. I'm happy with what
 13 I've got," and I think the word you used was the
 14 existing cable, if we're talking about cable in
 15 this instance, you have a stickier type of
 16 programming.
 17 The customer will stick to cable,
 18 because of the added or the totality of the
 19 programs?
 20 THE WITNESS: Right.
 21 JUDGE STRICKLER: So what makes the
 22 customer, in the way you described it, say to

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1 their salesman, the DirecTV guy or the telephone
 2 salesman, no thanks, I'm happy with it, because
 3 they've got Tennessee, the national capitol on.
 4 Are they happy because it's there, or are they
 5 happy because it's there and they watch it?
 6 THE WITNESS: Right. They aren't
 7 going to be happy that it's there if they don't
 8 care about it, right. So that implies some
 9 watching. But the degree of watching never comes
 10 into play.
 11 JUDGE STRICKLER: Well, the degree of
 12 watching never comes into play when the decision
 13 is being made whether to retransmit or not;
 14 correct? That's your testimony?
 15 THE WITNESS: Yes, yes, yes.
 16 JUDGE STRICKLER: But whether or not
 17 the retransmission is successful in making the
 18 station stickier, if you will, or the cable
 19 system I should say, the cable package stickier
 20 to the customer, is -- for that to be the case,
 21 you need eyeballs. People really need to be
 22 watching. Otherwise, as you say, if it's just

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1 there, they don't care.

2 So you don't measure viewing, but
3 viewing is important to make it stickier.

4 THE WITNESS: Well yes and no. I mean
5 I think that, you know, there's an element.
6 Look, if nobody's watching it, then it can't be
7 terribly important. But the fact that it's
8 there, if you think about, I've got access on 400
9 channels. I can't possibly watch 400 channels.
10 In fact, the average person only watches five to
11 ten at most.

12 JUDGE STRICKLER: How does a cable
13 system operator or a satellite system operator
14 determine, if they determine at all, when they
15 add that 401st station from Nashville, that that
16 has been successful on the margin in making it
17 stickier?

18 THE WITNESS: They don't do an
19 economic analysis.

20 JUDGE STRICKLER: But what do they do?

21 THE WITNESS: There could be, you
22 know, an exception. But they typically don't.

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1 JUDGE STRICKLER: So it's not
2 statistical in nature, an analysis of the
3 ratings. It's just, as you say, word of mouth.
4 It's just sort of casual. It comes from that
5 sort of a local grassroots --

6 THE WITNESS: Absolutely does.

7 JUDGE STRICKLER: And does the
8 converse happen? Do you find out through this
9 grassroots type of discussion you know, I don't
10 hear anything about anybody watching, you know,
11 that curling from Finland station that we put on.
12 Nobody's watching curling from Finland. Maybe we
13 should try curling from Sweden.

14 I mean do you ever have the situation
15 where you get that kind of word of mouth, you say
16 this station, it's not doing anything for us.
17 Let's retransmit a different station.

18 THE WITNESS: It does. You do wonder
19 that at times, when we're not hearing much about
20 that. But I have to tell you that in my
21 experience, I've never taken a channel off where
22 we didn't hear from customers, not one, and we

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1 You've got to remember that cable systems are
2 very local businesses. They have offices all
3 over and the people that work at them live in
4 those areas, and so -- and they have technicians
5 going out into homes each and every day.

6 Those people hear daily from their
7 customers, and so if something is on in a
8 neighboring town and not on here, and customers
9 want it, they're going to hear it, and they pass
10 that on to the general manager, who passes it on
11 to corporate.

12 So there's a constant feedback loop
13 that goes on, and it's on terms of a distant
14 station and, you know, I'm going to stay away
15 from cable networks for a minute, because they're
16 different, where they have a rep who's going come
17 out, knock on your door to talk to you, you know,
18 about this channel.

19 Distant stations don't do that for the
20 most part. I mean WGN does, but others don't.
21 So it's really feedback that's coming from the
22 cable system.

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1 were in position of having to take channels off
2 at different times, especially in the earlier
3 days of cable.

4 We only had three kind of channels,
5 and you wanted to come in and there was a lot of
6 new cable programming coming along, MTV, this and
7 that. And so what cable was doing was, you know,
8 picking up and retransmitting a lot of off-air
9 stations for the most part, and so to clear
10 space, you come in and take off stations.

11 And so we never did that once that we
12 didn't hear from customers, because somebody is
13 watching it, right. Somebody watches it for some
14 reason, and you hear from them. The other thing
15 that's important to know about ratings, right, is
16 ratings are really on -- are reeling, ratings as
17 a measurement are reeling, right because it's an
18 old-fashioned mechanism for a whole different
19 world today.

20 And so yeah. I just read yesterday
21 that some of the --

22 MR. MACLEAN: Objection.

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1 JUDGE BARNETT: Sustained.
 2 JUDGE STRICKLER: Just to close it off
 3 then, so you understand that in the industry,
 4 people go by word of mouth, as to what stations,
 5 included retransmitted stations, people are
 6 listening to, without any formal information in
 7 the way of ratings or anything else, to tell you.
 8 If you have that information cost-
 9 free, quite a fanciful argument or assumption,
 10 but if you have that information cost-free, so
 11 you would actually know who was watching which
 12 programs on the distantly -- or who was watching
 13 which distantly retransmitted stations, I should
 14 say, would that be of help to you?
 15 THE WITNESS: Well sometimes what I
 16 said was as to these distant stations that we're
 17 talking about, as opposed to cable networks,
 18 which are providing a lot of data about why their
 19 programming is valuable and self-evaluating and
 20 all sorts of things.
 21 But we're just talking about these
 22 distant stations. In that case, what I'm saying

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1 is it's mostly word of mouth that you hear about
 2 these things. And so if a television station
 3 came, knocked on my door and said here are my
 4 ratings, my question would be are these the
 5 ratings in my cable system?
 6 Because if they're not, it's
 7 meaningless to me, right. I mean, you know, it's
 8 like real estate, location, location, location.
 9 JUDGE STRICKLER: But if --
 10 THE WITNESS: Who cares what the
 11 rating is for a Memphis station in Memphis?
 12 JUDGE STRICKLER: But if you had the
 13 local rating, in other words, if you had word of
 14 mouth and you heard well, Strickler really likes
 15 this show. So hey, the technician came by and
 16 this guy Strickler says oh, we like the show.
 17 But if you could also get detailed
 18 information, so you find out Judge Barnett and
 19 Judge Feder and a whole host of other people were
 20 watching this show or were not watching this
 21 show, that would be better than just finding out
 22 that Strickler happened to like the show, right?

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1 THE WITNESS: It would be another bay
 2 of information. It wouldn't be determinative,
 3 determinative --
 4 JUDGE STRICKLER: It would be better
 5 than word of mouth though, wouldn't it?
 6 THE WITNESS: No, no. Word of mouth
 7 actually, I would still think is better, because
 8 you're hearing this from the people that live
 9 there daily, and you're hearing it.
 10 So ratings -- no matter what a rating
 11 is, you know, before you object, a rating only
 12 tells you how many people are watching at some
 13 moment in time. It could be the same five
 14 people, right, you know.
 15 You may have 100 people out there in
 16 your cable system or your television audience.
 17 Maybe five of them don't watch, five of them
 18 watch. But I'm after programming that is going
 19 to -- at least it's going to create a bundle
 20 that's got something for everybody.
 21 So just having, you know, the same
 22 type people watch every day at five o'clock, that

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1 really doesn't do anything for me, and it's
 2 really -- I know it's hard to understand. I've
 3 been through this discussion before. But it's
 4 really the difference between a broadcaster who's
 5 selling advertising, and all he's trying to do is
 6 get the biggest audience at any moment in time.
 7 That's why ratings are perfect for him
 8 or her. It tells the advertiser how many people
 9 saw my commercials, okay. But that's a different
 10 analysis and different dynamic than a cable
 11 operator or satellite operator who has 400
 12 channels, and wants to make sure that the bundle
 13 pleases as many people as possible.
 14 So if I had the ratings, I'd say yeah.
 15 I would say that's good information. Let me look
 16 at it. I'd ask a lot of questions, is it local,
 17 right? Do you have reach? Can you tell me in a
 18 month and in a year what percent of my cable
 19 subscribers tuned in and watched this thing.
 20 It's called reach, right. I want to know that.
 21 So it would be helpful information.
 22 It would not be determinative, and it would

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1 actually be less powerful to me than the word of
2 mouth from the employees who are there each and
3 every day, and can explain to me why this thing
4 isn't working.

5 JUDGE STRICKLER: I've got to be
6 careful what I say to my cable guy when he comes
7 around.

8 THE WITNESS: Believe it or not, they
9 do listen. I often tell people who are unhappy
10 with their subscription to multi-channel
11 services, you know what? Call them up and tell
12 them, because it actually does make a difference.

13 JUDGE STRICKLER: Thank you.

14 MR. BOYDSTON: We were just looking at
15 Exhibit 159. That was the second one about
16 DirecTV, and just to finish off that -- well,
17 let's go quickly to what's been marked as Exhibit
18 157, and let me know if you recognize that
19 document.

20 (Whereupon, the above-referred to
21 document was marked as IPG Exhibit No. 157 for
22 identification.)

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1 what it has in it is the -- again, the total Time
2 Warner Cable video revenue for the year 2013, all
3 their revenues, subscriber and otherwise for the
4 year, which totals \$10 billion.

5 Then it also has the advertising
6 revenue broken out, which is basically \$1.1
7 billion. So a little more than ten percent of
8 the revenue coming off advertising for Time
9 Warner Cable, the rest being subscription
10 revenue.

11 Q And so this exhibit and the other two
12 that you've looked at regarding DirecTV, this is
13 -- you're saying part of the information that --
14 upon which you have an understanding that
15 advertising is a small aspect of multi-system
16 operators; correct?

17 A That's correct.

18 Q And what is the significance of that
19 in terms of these proceedings, in your view?

20 A Well because ratings are the currency
21 by which audiences are measured, and the basis
22 for advertising sales, and although that's

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1 THE WITNESS: Yes, I do.

2 BY MR. BOYDSTON:

3 Q And what is it?

4 A The annual report for Time Warner
5 Cable, Inc. for 2013, I believe.

6 Q And did you review this beforehand?

7 A I did.

8 MR. BOYDSTON: Your Honor, I'd like to
9 move to admit Exhibit 157.

10 MR. MACLEAN: Subject to written
11 objection.

12 MS. PLOVNICK: No objection.

13 MR. BOYDSTON: And what is --

14 JUDGE BARNETT: Excuse me. 157 is
15 admitted, subject to the written objection.

16 (Whereupon, the above-referred to
17 document was received into evidence as IPG
18 Exhibit No. 157.)

19 BY MR. BOYDSTON:

20 Q Pardon me, Your Honor. What did you
21 glean from this document?

22 A This is a multi-page document, but

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1 changing, as I started to say before, the Nielsen
2 ratings are becoming less important.

3 But they have historically been the
4 currency used to buy and sell advertising, and so
5 they are indicative of the difference between a
6 broadcast station that lives and dies by
7 advertising, and a cable or a satellite system
8 that lives and dies by subscriber revenues.

9 Q Are you familiar with some of the
10 decisions that have been made on this subject
11 about the use of ratings in these kinds of
12 proceedings by the CARP?

13 A Yes, I am.

14 Q And what is your familiarity with
15 those rulings?

16 A Well, if I got all the pieces right,
17 as I recall, I was involved in the '98-'99 cable
18 royalty Phase 1, and as I recall and from a quick
19 review for this case, the CARP decided that
20 relative marketplace value was --

21 MR. MACLEAN: Objection. Your Honor,
22 it's not -- I don't think it's helpful expert

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1 testimony to have the witness recite his
2 interpretation of this panel's and the
3 predecessor panel's opinions.

4 JUDGE BARNETT: Sustained.

5 BY MR. BOYDSTON:

6 Q Do you have a view as to what factors
7 should be looked at in making distributions in a
8 proceeding like this, where you're trying to pay
9 owners of individual programs some share of the
10 copyright fees that are being paid by multi-
11 system operators around the country?

12 MS. PLOVNIK: Objection. This goes
13 beyond his expertise. He's not been qualified to
14 give an

15 COURT REPORTER: Excuse me. Can you
16 speak up?

17 MS. PLOVNIK: This goes beyond his
18 expertise. He's not been qualified as an expert
19 in valuation or an economist.

20 MR. BOYDSTON: I wasn't asking about
21 value. I was asking about what factors, that's
22 all.

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1 MR. BOYDSTON: Oh yes, Your Honor.
2 Actually, I'd like to move to admit Mr. Egan's
3 written direct testimony, or excuse me. I keep
4 messing up these titles and I do apologize to
5 everyone. Let me -- may I ask him about the
6 document to set the foundation?

7 JUDGE BARNETT: Please.

8 BY MR. BOYDSTON:

9 Q Mr. Egan, there in front of you I
10 believe you have a document entitled "Testimony
11 of Michael Egan, Independent Producer Group's
12 rebuttal to the written direct statement of
13 Settling Devotional Claimants and Motion Picture
14 Association of America." Is that the document
15 before you?

16 A Yes.

17 Q And did you prepare and sign this
18 document?

19 A I did.

20 Q Under the penalty of perjury?

21 A I'm sorry?

22 Q Under the penalty of perjury?

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1 JUDGE BARNETT: Overruled. As long as
2 the question is limited in that way.

3 THE WITNESS: Sure. I think that it's
4 clear to me that cable and satellite operators
5 don't use ratings to value programming. They use
6 the factors that I articulated because they
7 affect your bread and butter subscriber revenue.
8 And so to me, allocating royalties, whether it's
9 in Phase 1 or Phase 2 by ratings, misses the
10 mark.

11 BY MR. BOYDSTON:

12 Q Thank you. I believe you reviewed the
13 written testimony of Toby Berlin; is that
14 correct?

15 A Yes.

16 Q And based upon your review of Ms.
17 Berlin's written testimony, do you have any
18 criticisms of her testimony or her conclusions?

19 A I do. Let me just turn to that
20 section, so I remember what you refer to. So --

21 MR. MACLEAN: Could I ask what the
22 witness is looking at?

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1 A Under the penalty of perjury, yes.

2 MR. BOYDSTON: Thank you. Your Honor,
3 I'd like to move the testimony of Michael Egan,
4 which has been filed with the panel and served on
5 counsel, into evidence.

6 MR. MACLEAN: Could I voir dire him?

7 JUDGE BARNETT: You may.

8 VOIR DIRE

9 BY MR. MACLEAN:

10 Q Mr. Egan, who actually wrote that
11 document?

12 A I did.

13 Q Every draft?

14 A Every draft.

15 Q Did Mr. Galaz participate in preparing
16 language within that draft?

17 A He reviewed my draft.

18 Q And did he participate in what appears
19 in the final draft?

20 A He commented on it, and I considered
21 his comments and then I finalized my draft.

22 MR. MACLEAN: I have no other

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1 questions.

2 JUDGE BARNETT: And does this have a

3 number?

4 MR. BOYDSTON: I think the number next

5 in line would be --

6 MS. WHITTLE: 284.

7 MR. BOYDSTON: 284.

8 (Whereupon, the above-referred to

9 document was marked as IPG Exhibit No. 284 for

10 identification.)

11 MR. MACLEAN: What was that last --

12 (Simultaneous speaking.)

13 JUDGE BARNETT: We're just giving it

14 a number, 284. I'm sorry, Ms. Plovnick. Were

15 you

16 MS. PLOVNICK: I was going to say no

17 objection.

18 JUDGE BARNETT: Okay. 284 is

19 admitted.

20 (Whereupon, the above-referred to

21 document was received into evidence as IPG

22 Exhibit No. 284.)

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1 BY MR. BOYDSTON:

2 Q Thank you, Your Honor. Mr. Egan, I

3 believe you were in the middle of describing your

4 views on Ms. Berlin's testimony.

5 A Yeah. So Ms. Berlin misrepresents the

6 makeup and the priority of the factors by which

7 cable system operators and satellite system

8 operators evaluate -- do evaluate and value

9 programming, placing far, far too much weight on

10 Nielsen ratings and weighting on sizes.

11 Q And why is that you believe that she

12 makes that mistake?

13 A As I said earlier, multi-channel

14 distributors, which is the offhand phrase that

15 describes cable and satellite operators, are

16 dependent on subscriber revenues. And so they

17 evaluate the five factors I articulated earlier

18 on its programming, customer request, strategic

19 initiatives, competitive offerings.

20 Those are really the things they

21 evaluate in looking at programming, and the

22 reason they do that is that those are the primary

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1 factors that impact subscriber acquisitions,

2 subscriber retention. Ratings, if they're looked

3 at at all, are generally coming from the

4 programmer, you know, and TV networks, if I hand

5 them to them.

6 I'm not aware of a single cable

7 television MSO programming group, very

8 sophisticated, who want to subscribe to Nielsen

9 ratings. So generally, the network will walk in

10 ahead, here's our ratings, because they're good.

11 They're not going to hand them to you if they're

12 bad.

13 So she relies, you know, her point of

14 view is that ratings are really the determinant,

15 and I just think that's way off the mark. She

16 says that ratings were critically important to

17 DirecTV decisions, about which cable networks and

18 TV stations to include in its lineup.

19 I don't think that the evidence

20 supports that frankly, and I'll tell you why. So

21 if we go through basically cable networks,

22 distant stations, local stations, taking local

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1 stations first. Let me back up. I think that

2 DirecTV's or Dish, you can say, primary focus has

3 been duplicating cable's lineup, coming into the

4 marketplace and having programming parity first.

5 I think that's number one.

6 Number two is, in DirecTV's case,

7 getting the NFL Sunday Ticket package

8 exclusively, number two. And then number three,

9 adding more niche Dish networks, not ratings

10 winners, but small ratings, niche networks,

11 serving little audiences than cable had, because

12 when DirecTV first came on, they were digital

13 immediately; Cable wasn't.

14 They had more channels, so they could

15 do it. So they immediately went into Spanish

16 language, Asian programming, a lot more

17 religious, a lot more this, a lot more that

18 because they could.

19 Cable eventually went digital and

20 caught up to them on that. But I think that's --

21 that's what DirecTV was all about. I don't think

22 ratings had much a role, and if you look at the

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1 particulars, local television broadcast stations,
2 when the Satellite Home Viewer Act came in, you
3 know, it was passed, and it allowed DirecTV and
4 Dish to carry local television stations, that
5 was, you know, that was great timing for them.

6 So what they did is they put on the
7 local stations that they could, and as she says,
8 "The feeling among DirecTV management was that we
9 would be unable to meaningfully compete against
10 cable if we could not carry local content," and I
11 agree with that, and you see it in their numbers.
12 They jumped.

13 However, the Satellite Home Viewer Act
14 provided a provision was that you carry one,
15 you carry all. So if they want to carry any one
16 local station, they had to carry all local
17 stations that requested carriage, regardless of
18 their ratings. So I really don't see what place
19 ratings had in those decisions at all, and she
20 implies that it did have a place.

21 If we look at cable networks and
22 distant stations, she says "The single most

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1 point. Why would they do that? Well, they're
2 there because they build a package that gets
3 everybody. They know that they have the
4 capacity.

5 It's not a capacity issue. If
6 broadcasters, you know, at one station, 24 hours,
7 only three hours of prime time, got to get the
8 largest audience. That's not what cable and
9 satellite's about.

10 It's about, "I've got a lot of channel
11 space. Let me put on everything I possibly can
12 that's going to attract somebody, or keep
13 somebody from leaving me." And so that's what
14 DirecTV did. So I think that again, you know, is
15 contradictory to her point of view about ratings
16 being the single most important factor.

17 By the way, she basically admits the
18 primacy of subscriber revenues over ratings
19 towards the end of her testimony, when she says,
20 and I'm quoting "Every station had some loyal
21 constituency." Well, she prefaced this by saying
22 that she -- she makes a statement that once a

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1 significant factor that the business team of
2 DirecTV considered when evaluating new program
3 acquisition opportunities was ratings."

4 Again, I don't -- the evidence doesn't
5 bear that out. Basically, if you look at
6 DirecTV's lineup, it's made up of virtually
7 entirely niche cable networks. That's what it
8 is, hundreds of Spanish language stations,
9 religious stations, women's stations, children's
10 stations, music stations, so on and so forth,
11 just like cable systems are, and there are tiny
12 audiences in these things.

13 So I don't see that ratings had much
14 a role there. She talks about the great
15 marketing success they had, and in doing so, she
16 talks about the marketing tactic of targeting
17 niche demographics, that's her phrase, via the
18 addition of narrow cast networks of women-
19 oriented, children-focused, foreign language,
20 religious programming, all of which deliver by
21 design low ratings.

22 And this goes to, Judge, to your

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1 station was carried, they rarely if ever took it
2 off.

3 And by way of explaining that, she
4 says "Every station has some loyal constituency,
5 usually a niche audience." "However small,"
6 referring to the audience, "however small it
7 might be," this is out of order, "however small
8 it might be, we never wanted to have to retaliate
9 by turning off a platform or discontinuing
10 service."

11 So in other words, keeping them on as
12 subscribers was more important than the rating
13 attached to the station.

14 MR. BOYDSTON: Thank you, Your Honor.
15 Thank you, Mr. Egan. Your Honor, I have no
16 further questions at this time.

17 JUDGE BARNETT: Okay.

18 CROSS EXAMINATION

19 BY MS. PLOVNIK:

20 Q Good afternoon, Mr. Egan.

21 A Good afternoon.

22 Q I'm Lucy Plovnick. I'm counsel for

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1 MPAA, the Motion Picture Association.
 2 A Nice to meet you.
 3 Q Nice to meet you too. So Mr. Egan, I
 4 believe you testified that you worked at
 5 Cablevision Industries from 1980 to 1996; is that
 6 right?
 7 A Yes.
 8 Q And then after that, you worked for
 9 Renaissance Media Holdings. That's another small
 10 MSO from '96 to '99; is that right?
 11 A Yes.
 12 Q And after that, you formed Renaissance
 13 Media Partners, which is a consulting company?
 14 A Yes.
 15 Q So you've been doing consulting work
 16 since 1999?
 17 A Yes.
 18 Q And now your observations in your
 19 written testimony, they're based on your
 20 experience working as a cable operator; is that
 21 right?
 22 A Operator and consultant.

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1 Q And a consultant. But you haven't
 2 been directly employed by a cable operator since
 3 1999; is that right? You've been a --
 4 A I've been employed by many as a
 5 consultant.
 6 Q As a consultant?
 7 A Yes.
 8 Q But not as a direct employee?
 9 A No, as a consultant.
 10 Q As a consultant. And so that was more
 11 than 15 years ago, as you testified, that you
 12 were a direct employee of a cable system?
 13 A That's correct.
 14 Q Okay. So Mr. Egan when you worked at
 15 Cablevision and later at Renaissance Media, you
 16 were in charge of making programming decisions
 17 for cable systems at that time; correct?
 18 A Yes.
 19 Q Now when you were working at those
 20 MSOs, were programming decisions made at a
 21 regional corporate level, or a local level?
 22 A They were made at, generally, the

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1 corporate level. The field people had a lot of
 2 input, field people meaning systems and regions,
 3 but ultimately at corporate.
 4 Q The ultimate decision was at a
 5 corporate level?
 6 A Yes.
 7 Q And when we're talking about
 8 programming decisions by a cable MSO at a
 9 corporate level, we're talking about the
 10 selection of a whole broadcast channel or a whole
 11 cable network, correct? We're not talking about
 12 selection of an individual program?
 13 A Well generally you are, but cable
 14 companies do buy individual programs as well.
 15 But the bulk of what they're doing is buying
 16 networks or stations.
 17 Q Buying entire broadcast stations,
 18 entire cable networks or even bundles, as you
 19 were testifying, of multiple stations or
 20 networks?
 21 A Yeah. That would happen, and as I
 22 said, they were also purchasing individual,

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1 whether it's pay-per-view programs or the
 2 programming channels themselves, you know. We
 3 had probably 165 headends as we call it, probably
 4 85 cable stations at CVI, and virtually every one
 5 of them we were also programming channels
 6 ourselves, whether it's a Filipino channel in
 7 Long Beach, California, had a lot of Filipino
 8 people. We were purchasing programs, putting it
 9 together --
 10 Q So when you were purchasing programs
 11 and you were putting those things together, as
 12 you were just testifying, would you consider the
 13 same sorts of factors that you would consider
 14 here, or would you look at other factors when you
 15 were selecting a program?
 16 A Same factors.
 17 Q The same factors. Now in your -- now
 18 here's a question for that. For that, when you
 19 were selecting those, and you talk about pay-per-
 20 view and things like that, were those ad-
 21 supported situations, or were those solely
 22 subscription-based?

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1 A What was the last part of that?

2 Q Were those ad, like an ad-supported
3 cable network that you were selecting your own
4 programs for, or were those things that were
5 solely based on subscription revenue?

6 A Combination of both. So local news
7 were producing -- a local channel that has news
8 and sports and so forth, that would be ad
9 supported, in addition to, of course, subscriber
10 revenue from the system.

11 And then if it were, like in the case
12 of the Filipino channel I mentioned, which was
13 actually a channel in Long Beach, California,
14 that was a subscription.

15 Q Let's turn to page six of your written
16 rebuttal testimony. In the last sentence there,
17 you say "Audience size and its measure in Nielsen
18 ratings, which is critically important to
19 advertising sales supported cable networks and
20 broadcast stations, is just one of many
21 considerations involved," and going over to the
22 next page, "in CSO program carriage decision-

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1 broadcast station, I live and die by advertising
2 revenue, you know, and more so on the broadcast
3 stations. So I - although retransmission consent
4 fees are now, you know, becoming more
5 substantial, on the cable side TNT has a healthy
6 license fee.

7 But even in TNT's case, 50 percent of
8 their revenues are advertising. In the case of
9 WABC, it's probably today 90 percent or more, and
10 it's the reverse for cable systems was my point
11 here. It's just not -- audience size is just not
12 a critical factor to them.

13 Q But it is a factor though?

14 A It's a factor, yeah it's a factor, and
15 I say here, ratings are a factor, you know,
16 ratings being a measurement of audience size.

17 Q "Ratings are critically important,"
18 you say?

19 A Not cable operators. That's the point
20 I'm making.

21 Q To advertising sales-supported cable
22 networks?

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1 making," and you go on to list the factors.

2 So you make a distinction here between
3 ad sales-supported cable networks and broadcast
4 stations, and you could link Nielsen ratings to
5 those particular situations. Is this something
6 that you're making here, when you're talking
7 about programming, and you just said that like
8 well I've -- there have been some situations
9 where I would program network.

10 Is there any distinction there between
11 what you're talking about here, where you say "in
12 some situations I would look at Nielsen, and in
13 others I would not"?

14 A I'm not sure I understood your
15 question, so let me try an answer, and then if I
16 blow it, you'll tell me.

17 Q Yes, yes.

18 A I'm not making any distinction here,
19 along the lines I think of what you're asking me.
20 I'm just really making the distinction that if
21 I'm, you know, I'm MTV or I'm TNT, a cable
22 network, or I am, you know, WABC, a New York City

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1 A To cable networks.

2 Q To cable networks.

3 A But this proceeding is not about cable
4 networks, as I understand it. It's about the
5 copyright fees coming from cable systems and
6 satellite systems. And so my point is that they
7 are not -- they, those who are paying the
8 royalties and valuing the programming, putting
9 monetary value on it, are not looking at the
10 ratings. They're not looking at the audience
11 size.

12 JUDGE STRICKLER: Excuse me Ms.
13 Plovnick, I'm going to ask the witness a
14 question.

15 MS. PLOVNICK: Go ahead, go ahead.

16 JUDGE STRICKLER: Thank you. You've
17 talked about niche programming and the need to be
18 able to attract those types of marginal
19 subscribers, additional. By marginal, I mean
20 additional subscribers to keep them stuck, sticky
21 as it were?

22 THE WITNESS: Yes.

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1 JUDGE STRICKLER: And you mentioned,
2 just by way of example, the Filipino channel out
3 in Long Beach, California. So when you're
4 programming on a program by program basis, if you
5 have two similar programs that satisfy the same
6 niche, and you have to make a decision as to
7 which one you're going to transmit. They both
8 would satisfy the niche.

9 If you look at all for that to
10 determine which one will do a better job of
11 attracting those niche viewers?

12 THE WITNESS: If you had ratings that
13 would tell you that, you would look at that for
14 sure.

15 JUDGE STRICKLER: You ever have that
16 kind of information?

17 THE WITNESS: Certainly not in the
18 example, you know, you raised --

19 JUDGE STRICKLER: How about as your
20 example --

21 THE WITNESS: No. The answer is no.
22 I really honestly don't ever remember a case

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1 You know, that information might be
2 helpful to me, because I might then say, you
3 know, I'm top heavy on programming for men. I've
4 got an awful lot of sports, regional sports,
5 ESPN. I really would like something attracting
6 younger women.

7 So 18 to 34, Oxygen, 18 to 34 year-old
8 women. You know, that's adding value again.
9 It's not just piling on what I already have.
10 It's adding something that may be an underserved
11 audience. So it's not just the audience size.
12 It's who are they, because that would be
13 important to me in that consideration.

14 I would also want to know are these
15 ratings from my cable system, you know. If
16 they're not, then it's really not useful
17 information to me. So but that just doesn't come
18 up, you know. It just -- I've got to tell you.
19 It doesn't happen. The networks will walk in
20 with ratings.

21 So if I'm AMC Networks, I'm going to
22 walk in, show you the ratings from Madmen Episode

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1 where ratings were a deciding factor.

2 JUDGE STRICKLER: You said -- so if I
3 understood you correctly, you say if you had
4 ratings information and you had to choose between
5 two sort of homogenous programs that could
6 satisfy the niche, it would be important
7 information. In your experience, you don't have
8 that information?

9 THE WITNESS: If I had it. But Your
10 Honor, I'd also stress it would be important --
11 it would be a consideration, because remember
12 again what I said about ratings. So what is this
13 rating? If it's a household rating, all right,
14 it's not telling me who's watching it. It's just
15 telling me that that household had it on, right?
16 That's all it's telling me.

17 Now if it's a demo rating, which is
18 the way advertising is sold for the most part,
19 you know, it's telling me oh, it's a high rating
20 among men, let's take a sports network, they have
21 a high rating among men 18 to 34, 25 to 54, or
22 women, you know, reverse.

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1 2, Sunday night in their concluding season,
2 because I'm sure they're gigantic. I'm going to
3 show you that. But the cable operator already
4 knows that, right. You don't need to tell me
5 that Madmen has big ratings. I know that, right.

6 So you know, it's a different analysis
7 for the multiple system distributor. They're
8 looking at added value to the package.

9 BY MS. FLOVNIK:

10 Q So how many CSOs, if you know, how
11 many CSO program networks were there in the
12 period at issue here, which would be like 2000
13 through 2009? How common was that?

14 A How many cable system operator
15 networks were there?

16 Q Yeah, I mean program by a cable system
17 operator, where the individual programs were
18 selected by a cable system operator?

19 A Oh, I don't know the number. I
20 wouldn't know that off the top of my head. I
21 don't know.

22 Q Yeah. Would you think it would be a

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1 very large number?

2 A It would be a very large number, sure.

3 Q All right. So Mr. Egan, everything

4 that we have been talking about, when you were

5 talking about making selections for

6 retransmitting distant signals, you are aware

7 that currently there's a regulated market in

8 place.

9 So what we have is a statutory

10 license, and distant signals that are

11 retransmitted by cable operators and satellite

12 carriers, they are done pursuant to a statutory

13 license. That's correct, right?

14 A Oh, that's been in place a long time,

15 yes.

16 Q And because of the statutory license,

17 cable operators don't engage in direct

18 negotiations to carry distant broadcast signals,

19 do they? They carry them pursuant to the

20 license?

21 A Well yes and no. I mean they've still

22 got to get permission from the station, the

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1 carrier for the most part. So they've got to

2 have a -- eventually have a retransmission

3 consent negotiation.

4 Q For a distantly retransmitted

5 broadcasting signal that's out of market?

6 A Correct, correct.

7 Q You would still need retransmission

8 consent to take WGN out of market?

9 A WGN no longer is being considered a --

10 WGN is not considered a cable service, as of just

11 very recently, because prior to that, they would

12 have to have not a retransmission consent

13 discussion with WGN, because it a national sales

14 force that put it up on the satellite,

15 retransmitted it and it was --

16 For the most part it was Tribune

17 Broadcasting. So you would negotiate with them

18 for that, and pay a license fee as opposed to a

19 retransmitting consent fee, in addition to the

20 copyright fee.

21 Q That's not part of Section 111 or 119

22 is it, of the Copyright Act?

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1 A No.

2 Q This is separate and apart from 111

3 and 119?

4 A Correct.

5 Q So and it is correct that under the

6 statutory licenses, that a cable operator cannot

7 make any changes to a broadcast signal that's

8 going to be distantly retransmitted out of

9 market, right?

10 A Meaning they have to carry the whole

11 thing.

12 Q They have to carry the whole thing,

13 and they can't alter it?

14 A That's correct.

15 Q So in the current regulated market,

16 you would not be selling advertising on distant

17 broadcast signals, would you?

18 A That's correct.

19 Q Now you're aware from the decisions

20 that you reviewed, and also as previously

21 testified in these proceedings that the Judges

22 are tasked with developing a hypothetical market,

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1 and figuring out the market value of the programs

2 that are distantly retransmitted, absent a

3 statutory license.

4 So a hypothetical market with no

5 regulation, and determining market value in that

6 context. Are you aware of that?

7 A Yes.

8 Q So in a hypothetical market, like the

9 one I'm just talking about, with no regulation,

10 there would be no rule that would prevent a cable

11 operator from selling advertising on a distant

12 broadcast signal, would there?

13 A Although if you're new world. I'll

14 assume that --

15 Q Just that hypothetical, hypothetical

16 market.

17 (Simultaneous speaking.)

18 BY MS. FLOVNIK:

19 Q So if you assume that there wouldn't

20 be any statutory license imposed for distant

21 signals, and that there also wouldn't be any

22 regulatory construct preventing a cable operator

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1 from selling advertising time, so would a cable
2 operator be able then to do a direct license deal
3 for a program on a distant signal in that
4 hypothetical market I just described?

5 A If that's what the rule said, yes.

6 Q And if you did and you were able to
7 sell advertising time on that distant signal,
8 would you not want to know what the Nielsen
9 ratings were in that context, in order to make
10 that decision?

11 A You're asking me the same question,
12 the cable operators and satellite operators have
13 been faced with for 15 and 20 years, because they
14 do sell advertising on cable networks.

15 Q And would they look at Nielsen
16 ratings?

17 A No.

18 Q They would not look at Nielsen ratings
19 for selling that?

20 A No, no. They'd hand it to them,
21 because the network comes in and their salesman
22 is there, and he'll show you the ratings for

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1 Madmen last night. I don't know one cable
2 programming group, Comcast, Time Warner, go down
3 the list, that subscribes to Nielsen ratings.

4 Q So your testimony is that even if the
5 Nielsen ratings, that you wouldn't look at them?

6 A You said that. I didn't say that.

7 Q No, that's what you just said. They
8 will hand them to you, but I thought I understood
9 that you said you wouldn't look at them?

10 A You're twisting what I said. I
11 wouldn't subscribe to ratings and look at them in
12 determining whether I was carrying something. If
13 you walked in and handed it to me, I would be
14 polite, consider what you're handing me,
15 important that I would look at it. But it's not.
16 I'm not going to get it if you don't hand it to
17 me.

18 Q But are you going to care what I -- if
19 I am presenting you with --

20 A I definitely care. If you think it's
21 important enough to me, I'm going to look at it,
22 yes.

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1 Q You're going to look at it, but are
2 you actually going to consider it in your
3 decision-making?

4 A I'm going to consider it, absolutely.

5 JUDGE STRICKLER: Is it your position
6 in this hypothetical world that counsel's
7 describing, that you wouldn't go out and get
8 Nielsen data because it wasn't worth the money?
9 In other words, not only if you got the Nielsen
10 data that Ms. Plovnick might hand you for her
11 show, but you got the Nielsen data for all the
12 shows that you could choose to retransmit in the
13 hypothetical world. You didn't have to pay for
14 it. There's a hypothetical world for you. Would
15 you use it?

16 THE WITNESS: Yeah, and hopefully
17 there's nobody from Nielsen here who's hearing
18 that we're going to give it away free. I would
19 look at it, but again, I don't want to repeat
20 myself, but what I want to know is this going to
21 -- what's the cost, what's the cost is my first
22 question.

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1 JUDGE STRICKLER: The cost of what?

2 THE WITNESS: Of this programming.

3 JUDGE STRICKLER: Right.

4 THE WITNESS: You know, what's the
5 cost? Is there a fee, a license fee, a
6 retransmission consent fee and a copyright fee?
7 What does that add up to? Does it add up to 50
8 cents a customer per month? What is it, because
9 that's how, you know, all of the channels I carry
10 have a per month fee attached.

11 JUDGE STRICKLER: Let's keep going
12 down this hypothetical boulevard a little
13 further.

14 THE WITNESS: Yes.

15 JUDGE STRICKLER: The cost is the same
16 for each program. All you're looking at is
17 potential eyeballs.

18 THE WITNESS: Okay.

19 JUDGE STRICKLER: How important in
20 this hypothetical world that we've constructed,
21 if cost is constant over the programs, how
22 important, if at all, the ratings are?

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1 THE WITNESS: Okay. So I'm going to
2 assume, and this is a huge assumption, right,
3 it's probably not going to be true. I'm going to
4 assume these are ratings in my cable system,
5 right, not in the next door cable system or
6 across the country, because I don't know how much
7 you're familiar with this stuff, but ratings vary
8 dramatically in different places, right.

9 So I'm going to want to know are these
10 ratings in my cable system, and I'm going to want
11 to know the rating, what the rating is. Is it a
12 household rating, total day household; is it
13 total day men, you know, a certain age. I want
14 to know the demo. I want to know what this
15 rating is, right?

16 And now I will take that information,
17 and then I'll look at it in concert. It will be
18 a consideration that I'll look at, in addition to
19 the license fee, the economics of it, how
20 important I think that programming is in adding
21 value to my bundle.

22 Because, you know, to give you an

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1 I've got, already have my 400 channels I'm
2 already carrying, now you're coming to me and
3 saying oh, I've got a big rating on channel, you
4 know, the Zebra channel, the new one, right.

5 I'm going to say okay, that's
6 interesting. Is it from my cable system? What
7 is the demo of the rating you're showing me.
8 Okay, good. That's interesting information. Now
9 let me look at what this programming is. Maybe I
10 already have everything that's on the Zebra
11 channel somewhere else, and it doesn't cost me
12 anything more to keep it. I already have it.

13 Maybe it's targeting Filipino people
14 and there are no Filipino people, because my
15 cable system's in upstate New York. So you know,
16 it will be information that I would look at.
17 It's certainly not going to be determinative, and
18 number two, this is a new world that doesn't
19 exist today that we're talking about.

20 So you know, we're playing with
21 hypotheticals here.

22 BY MS. PLOVNICK:

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1 example, right. So USA Network, you're familiar
2 with USA Network, is a cable channel. It has big
3 ratings, because it's programmed like a broadcast
4 television station, you know. It's got drama,
5 it's got comedy.

6 JUDGE STRICKLER: And the Stanley Cup
7 playoffs this season?

8 THE WITNESS: I'm sorry?

9 JUDGE STRICKLER: And the Stanley Cup
10 playoffs this year.

11 THE WITNESS: At USA?

12 JUDGE STRICKLER: USA Networks.

13 THE WITNESS: So it gets big ratings.
14 But if you look at the cable satisfaction studies
15 that are done regularly, where customers rate
16 networks and same things are done with cable
17 operators, where they rate networks, you're not
18 going to see USA at the top of the heap, because
19 there's a replacement for it. NBC, ABC, TNT, bah
20 bah bah.

21 It's not a niche channel adding value.
22 So when you're -- are in this new world, where

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1 Q So Mr. Egan, you testified previously
2 before the Copyright Arbitration Royalty Panel in
3 the 1998-99 Phase 1 proceeding; is that correct?

4 A Yes.

5 Q And you were a witness for the Joint
6 Sports Claimants in that proceeding?

7 A I was.

8 Q And you testified -- you said earlier
9 it was 2003 that you testified?

10 A I believe it was 2003. It was right
11 around there.

12 Q Yeah, and you understood that you were
13 under oath in that proceeding and it was
14 important to tell the truth; correct?

15 A Yes.

16 Q Now do you recall testifying in that
17 proceeding that as a cable operator, you would
18 look at ratings in making programming decisions?

19 A I don't recall, and I don't know, you
20 know. If you're quoting me, I don't know the
21 context. You could also pull out some of today's
22 conversation and say that back to me. So I would

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1 have to look at my testimony to truly understand
2 the context.

3 Q Well, I actually have an excerpt of
4 that. So if I could mark this as the next MPAA
5 exhibit, 376?

6 MP 376.

7 (Whereupon, the above-referred to
8 document was marked as MPAA Exhibit No. 376 for
9 identification.)

10 MS. PLOVNICK: 376, and I will -- if
11 I may approach?

12 MR. BOYDSTON: Your Honor, this is an
13 exhibit that they didn't give us at any point in
14 time, and they've known that Mr. Egan was going
15 to testify and testify about this information for
16 quite some time. We're only seeing this right
17 now.

18 MS. PLOVNICK: This is a cross-
19 examination exhibit, Your Honor, and per the
20 Judge's regulations, they do not have to be
21 exchanged in advance.

22 MR. BOYDSTON: Well, we've gotten a

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1 helpful information on page 14, I mean line 14 of
2 page 46.

3 A Okay. So why don't we -- the rest of
4 us have a chance to catch up to you and read it?

5 (Pause.)

6 THE WITNESS: I don't -- I don't see.
7 Ask me a question or point me to it.

8 BY MS. PLOVNICK:

9 Q Yeah. So I was saying, so you did
10 testify in this proceeding that you would look at
11 ratings.

12 A You're playing games. I think going
13 back to what I said to you today, you say if
14 somebody handed me ratings, I would look at them.
15 If somebody came in and said, you know, you can't
16 believe the ratings that these music videos get
17 when played on, it was probably ABC overnight,
18 and handed them to me.

19 I would look at them and I would say
20 what, you know, I didn't know that. I'm amazed.
21 Or it's The Puppy Channel, I got handed ratings.
22 But as I say here, so generally it isn't a

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1 different ruling on issues like that in the past.
2 I know for certain.

3 JUDGE BARNETT: Overruled. 360 --
4 MP 376.

5 MS. PLOVNICK: I'm sure it is the only
6 exhibit. Oh, I'm sorry. I gave the witness not
7 the Clerk's copy. I apologize. It's 376, and
8 I'm going to give you the Clerk's copy.

9 MR. BOYDSTON: Sure.

10 MP 376.

11 MS. PLOVNICK: It's 376.

12 MR. BOYDSTON: Where are we looking?

13 BY MS. PLOVNICK:

14 Q So if you could look, and this is an
15 exchange between you and Judge Von Kahn in that
16 hearing. So if you could look on page 45, at the
17 page numbers at the bottom, line 18 through 19.

18 You say "There are definitely
19 circumstances where I would look at ratings," and
20 then page 46, when we were talking specifically
21 about a -- or you were talking about a
22 hypothetical market. you say the ratings will be

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1 question of ratings. It's a question of
2 perceived value. You know, what is kind of going
3 on in my cable system that I don't already have.

4 JUDGE STRICKLER: Excuse Ms. Plovnick.
5 Going over your Puppy Channel versus Animal
6 Planet example that goes back to this prior
7 testimony, you point out at the bottom of page 46
8 of Exhibit 376, you say with regard to the cable
9 system, if he's -- quote, "if he's carrying
10 Animal Planet already, and they've got a whole
11 bunch of shows about dogs and puppies, the fact
12 that the Puppy Channel comes in and says, you
13 know, in the LA market we ran three specials on
14 puppies and they're up through everything else."

15 But what about the hypothetical where
16 you have to choose -- you don't have Animal
17 Planet on already. So you have to choose between
18 the Puppy Channel and Animal Planet. You've got
19 no animal channels at all. Here comes these
20 adorable puppies, here comes the other adorable
21 animals. Now you've got to figure out which
22 channel you want.

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1 Are ratings more important in that
2 situation than if you already had one on already,
3 and had already satisfied that niche in your
4 mind?

5 THE WITNESS: Yes, they would be more
6 important in that situation, because I don't
7 have, you know, that on. But again Your Honor, I
8 want to stress, so it's not taken out of context
9 as this was attempted to be, I would be looking
10 at a number of considerations.

11 I would ask you what are you going to
12 charge me, you know, and a lot of other questions
13 about you as a content provider, and I would want
14 to know do I have any, you know, research
15 internally, whether it's like people telling me
16 or customer satisfaction research, that's telling
17 me is there a demand for puppy or Animal Planet
18 programming and so on and so forth.

19 So it would now, in that situation you
20 just described yes, it would be information that
21 would be helpful. It wouldn't be determinative.
22 I would look at a bunch of things, all of the

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1 MR. MACLEAN: No objection.

2 JUDGE BARNETT: I'm sorry. The
3 exhibit number is 376, and it is admitted.

4 (Whereupon, the above-referred to
5 document was received into evidence as MPAA
6 Exhibit No. 376.)

7 MS. PLOVNICK: Can I just have a
8 moment, Your Honor?

9 JUDGE BARNETT: You may.

10 (Pause.)

11 BY MS. PLOVNICK:

12 Q Mr. Egan, so you testified about
13 bundling earlier today, and about combining
14 stations and the need to bundle to make it
15 attractive bundles for your subscribers. What
16 percentage of broadcast signals that you offered
17 were offered in bundles, versus a la carte?

18 A What percentage of broadcast signals
19 were offered in bundles versus a la carte? I
20 would think, I would think -- yeah, it was 100
21 percent.

22 Q And when you were making programming

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1 things we just talked about.

2 JUDGE STRICKLER: Thank you.

3 BY MS. PLOVNICK:

4 Q But there are circumstances where it
5 would be helpful information for you?

6 A Yes.

7 MS. PLOVNICK: Your Honors, I move to
8 admit MPAA Exhibit 376.

9 MR. BOYDSTON: Your Honor, I object,
10 and I don't know what regulation Ms. Plovnick is
11 referring, that means that you cannot disclose
12 that you have the documents beforehand and you
13 can use them on impeachment, without having done
14 so beforehand. If I am wrong, I am wrong. I was
15 not aware of a regulation in that regard.

16 JUDGE BARNETT: Rule 351.11 sub G or
17 excuse me, .10, sub G.

18 MS. PLOVNICK: Thank you, Your Honor.

19 MR. BOYDSTON: Thank you, Your Honor.

20 Withdrawn.

21 JUDGE BARNETT: Any objection from the
22 Claimants, 366?

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1 decisions, you would be selecting whole channels
2 to add to those bundles; correct, for broadcast
3 stations?

4 A With the context of what we talked
5 about here, when there were cases where we were
6 putting together channels, programming them
7 ourselves. But I think to the point -- to the
8 question you're asking me, the answer would be
9 yes.

10 Q With the exception of the isolated
11 incidents we're talking about, like what did you
12 say, the Filipino network? Was that what you
13 mentioned?

14 A Yes.

15 Q With the exception of that, in most
16 situations, for the majority of cases, you were
17 selecting whole channels to put in bundles; is
18 that correct?

19 A Yes.

20 Q A whole broadcast signals to put in
21 bundles; correct?

22 A Along with all the cable networks,

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1 yes.

2 MS. PLOVNICK: With all the other

3 cable networks, right. One more moment. I have

4 no further questions for Mr. Egan.

5 JUDGE BARNETT: Thank you. Mr.

6 MacLean.

7 CROSS EXAMINATION

8 BY MR. MACLEAN:

9 Q Good afternoon, Mr. Egan.

10 A Good afternoon.

11 Q I'm Matthew MacLean. I represent the

12 Settling Devotional Claimants.

13 A Glad to meet you.

14 Q So first I want to ask you, have you

15 ever worked for DirecTV?

16 A No.

17 Q Do you have any personal knowledge as

18 to how DirecTV makes its programming decisions?

19 A Personal knowledge, yes I do.

20 Q And what's that based on?

21 A Based on talking to DirecTV employees

22 at cable conferences, cable and satellite

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1 conferences, and also observing DirecTV for

2 however long it is.

3 Q Do you know Ms. Berlin?

4 A I'm sorry?

5 Q Do you know Ms. Toby Berlin?

6 A No.

7 Q Have you ever -- so you've never

8 spoken to Ms. Toby Berlin as to how she makes

9 programming decisions?

10 A I have not, no.

11 Q You testified briefly about the carry

12 one, carry all rule?

13 A Yes.

14 Q With respect to satellite provider

15 must carry all local stations if it carries one,

16 all local stations that elect to be carried; is

17 that right?

18 A Yes.

19 Q If a local station chooses not to

20 elect carry one, carry all, then the satellite

21 provider has to negotiate if they want to carry

22 that station, right?

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1 A Yeah. Just rephrasing what you said,

2 if a station in essence chooses retransmission

3 consent as opposed to a must-carry, then they'll

4 have to negotiate that deal, correct.

5 Q And they have to negotiate a price

6 point, right?

7 A Correct.

8 Q So to get at what you're talking

9 about, particularly with regard to your

10 programming factor, one of your key principal

11 factors, economics and programming, now economics

12 we don't have any control over in this

13 proceeding, right, where the price is set, you

14 know, by -- not through the Phase 2 proceedings;

15 correct?

16 A Yes.

17 Q So with respect to the programming

18 factor, it sounds to me like what you're really

19 talking about is the importance of programming

20 that appeals to certain niche audiences or

21 certain sub-audiences; correct?

22 A I wouldn't, you know, it's kind of a

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1 limited characterization. It's a question of the

2 added value. What is the programming adding to

3 what I already have?

4 Q Well, for example, there's programming

5 out there. I'm just trying to understand what

6 you're saying.

7 There's programming out there that,

8 you know, people like or watch just because it's

9 on TV, I Love Lucy at 11:30 at night, because

10 they can't go to sleep, the kind of things that

11 ratings aren't going to, you know, might tend to

12 overvalue, because people are just watching

13 things on TV, right?

14 A There's certainly that aspect, yes.

15 Q On the other hand there's, you know,

16 kind of the fluff and pillow that, you know, just

17 appeals maybe generally, but not to a really

18 targeted audience?

19 A I'm not sure I'm following you there.

20 Q Well, on the other hand, there is the

21 kind of programming that appeals to a niche

22 audience, that people will watch religiously,

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1 right?

2 A There certainly is niche programming
3 that people watch religiously, yes.

4 Q That will -- that might not be
5 generally, might not have general appeal, but
6 those people who watch it will watch at will?

7 A Will watch at what?

8 Q Will.

9 A I don't like that word, loyal, but
10 they watch it passionately and they stick with
11 it, yes.

12 Q And I think you said, in response to
13 Judge Strickler's question, if you were in the
14 situation of having to decide on a program by
15 program basis, between two programs that appeal
16 to the same niche, would you prefer the one that
17 has -- that appeals to a larger section of that
18 niche or a smaller section of that niche?

19 A I don't know, because I have to look
20 at all the other factors that we discussed.

21 Q What are those?

22 A There's the cost.

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1 Q Assume cost is equal.

2 A I'm sorry?

3 Q Assume cost is equal.

4 A Okay.

5 Q Which would rather have? Would you
6 rather if you're looking at two programs that
7 appeal to the same niche, would you rather have
8 the one that appeals to three-quarters of the
9 niche or half of the niche?

10 A Well I'm going to fill in your
11 question a little bit for maybe a context to my
12 answer to your question. So if I am faced with
13 two channels, two networks, two stations, and
14 they're programming exactly the same thing in the
15 same category.

16 So they are both, you know, going back
17 to the Judge's example, they're both animal-
18 oriented networks, and the demo that they're
19 hitting is the same demo, right, which you know,
20 you recognize is a giant F, because some channels
21 skew older. Fox News is much older than MSNBC,
22 but they're both news channels, aren't they?

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1 So you know, that would be an example
2 where context of which demo am I hitting makes
3 all the difference. So if they're hitting the
4 same demo and it costs the same, and I don't have
5 this programming on already, and I think this
6 programming is significant, not just, you know,
7 it's animal stuff, but nobody cares, it's
8 significant, then ratings would become an
9 important factor to me in making the decision on
10 which one of the --

11 Q Now would you agree with MPAA that the
12 number of minutes a program is on is an important
13 factor as to how valuable it is to you?

14 A Again, could you -- the number of
15 minutes that it's on the system?

16 Q The length of the program. Would you
17 say -- are hour long programs more valuable to
18 you than half hour programs?

19 A Oh, I see. I didn't understand. I
20 don't know. I don't think they are.

21 Q Sir, you have to stop when --

22 A I'm sorry, I didn't hear. My hearing

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1 is bad.

2 MR. BOYDSTON: I just want to clarify
3 --

4 MR. MACLEAN: I'll simply ask is it --

5 JUDGE BARNETT: Thank you. That's
6 sustained.

7 BY MR. MACLEAN:

8 Q Is it a -- are longer programs more
9 valuable to you than shorter programs?

10 A I don't have an opinion on that.

11 Q Is that a no or is it just --

12 A Just I don't have an opinion on it.
13 I didn't say it, I didn't think about it. I'm
14 not going to offer something off the top of my
15 head on that.

16 Q Would you say daily programs are more
17 valuable than weekly programs?

18 A Again, I know you want sound bites,
19 but I just can't feed them to you, because --

20 Q I'm not looking for sound bites. I'm
21 looking for --

22 A NFL games, you know, my New York Jets

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1 are playing New England Patriots once a week, is
2 that less important therefore than I Love Lucy,
3 which is on Monday through Friday? No, no it's
4 not. So I can't answer that question.

5 Q Well, didn't you just answer by saying
6 no it's not?

7 A I don't know that I did say that, but
8 I'll repeat or I'll rephrase then. I don't know
9 if it's more important or not. I don't think
10 that the fact how many times it's on a week is
11 going to determine that.

12 Q Would you be able to program -- you
13 understand we're trying to value, even though I
14 understand that you are accustomed to obtaining
15 programming on a station by station basis; right?

16 A For the most part, yes.

17 Q You understand that in this
18 proceeding, we are nevertheless trying to value
19 programs on a program by program basis?

20 A Yes, I know.

21 Q So would you agree that a program that
22 airs during prime time is more valuable than

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1 because I'm just trying to equate - I'm trying
2 to be responsive to your question, which is
3 really a day time question, I think is what
4 you're asking me, you know.

5 More people watch television in the
6 prime time than they do in the day time. So you
7 know, you could say that there's more
8 significance there in general. I would agree
9 with that. But beyond that, it's so many what
10 ifs that I just -- I just think it's not terribly
11 valuable information.

12 Q Would you say that all programming in
13 a particular day part is of equal value?

14 A Or programming within a day part is of
15 equal value, equal value to --

16 Q To all other programming in the day
17 part?

18 A No, the value to who?

19 Q Well, I believe you're testifying
20 about things that cable system operators value.

21 A Okay. So that you're asking me to a
22 cable system operator, would all programs in the

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1 programs that don't air during prime time?

2 A It depends on the program. Again, I
3 think I'm going to say do you understand what I
4 mean when I say that. Not every program that
5 airs in prime time is more valuable than one that
6 airs in the day time, right.

7 The, you know, NFL games take place in
8 the day time. So all things being equal, let me
9 try and do it that way. So all things being
10 equal, I would think that a program, you know,
11 that airs in the day time. in the prime time, is
12 more likely to be more valuable than one that
13 airs in the day time assuming, you know, similar
14 ratings, similar content, all that kind of stuff.

15 But you know, it's so many cascading
16 irs here that I don't think it's really valuable
17 information.

18 Q If you just said "assuming similar
19 ratings." Why would that be? Why would that
20 matter?

21 A Well again, I use rating as an offhand
22 for every measure I can come up with, right,

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1 same day part give equal value to the cable
2 system operator? No.

3 Q Now -- are you familiar with the
4 concept of counter-programming?

5 A Yes.

6 Q Can you explain what counter-
7 programming is?

8 A What you're programming against. So
9 you're programming against another program. So
10 maybe we stay with the NFL example, which should,
11 you know, tends to then - they might program
12 something targeted to women at the same time, at
13 your station.

14 Q Explain that again? I'm sorry. I
15 misunderstood the last part of what you said.

16 A A counter program generally means that
17 you're programming against something. So I gave
18 the example of an NFL game, and I might program
19 on a different channel against that NFL. I'm
20 going to try and get a different audience. So
21 I'm going to program for women at that time.

22 Q Okay. That's a good example. You're

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1 not going to -- if you're a broadcaster or if you
2 have a station, you're not going to try to target
3 the same audience that -- or date that one of
4 your competing stations is picking up at that
5 time?

6 A Is that -- is there a question?

7 Q It's for my understanding.

8 A Oh, is that what I meant? Yes, that
9 is what I meant.

10 Q In the same way, a station might not
11 might not broadcast its most popular
12 programming or at the same time another station,
13 a competing station, is broadcasting its most
14 popular program?

15 A They might, I guess.

16 Q If you'd turn to page ten of your
17 rebuttal testimony. Now about the middle of the
18 page, I'm sorry. Let me find it here. Okay.
19 About the middle of the page, there's a sentence
20 that starts "and the cost of each and every
21 hour." Do you see that?

22 A I do.

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1 Nielsen viewership ratings don't afford a basis
2 of determining relative marketplace value of
3 programming, and that's quoting from the '98-'99
4 decision, and I put a quote from the CARP in
5 there.

6 Then I go on to say, getting to your
7 paragraph 16 now, right, "Because ratings,"
8 Nielsen ratings, "do not indicate relative
9 marketplace value of programming, it seems to me
10 illogical and perhaps ultimately untenable to
11 allocate royalties among claimants proportional
12 to the ratings of the programs they represent.

13 "Furthermore, because the cable system
14 is statutorily required to carry all of an
15 important station's signals," as we discussed
16 earlier, "and the copyright fee for it is
17 calculated as one sum," right, "the CSO, the
18 cable system must take and therefore must pay for
19 all of the 24 hours of station signal, not just
20 the sports of the local news of the adjacent
21 market that it really wants.

22 It's got to pay for the whole thing,"

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1 Q And you say "and the cost of each and
2 every hour is an equal pro rata portion of the
3 lump sum unaffected by ratings." Do you see
4 that?

5 A I do.

6 Q Is that the way cable system operators
7 account for the cost of programming, as a pro
8 rata share of every -- of every hour of the
9 station?

10 A No.

11 Q This is an accounting you just gave.
12 What did you mean by this?

13 A Well again, context is everything,
14 right? So what precedes this is my explanation
15 of the factors by which cable system and I
16 believe satellite system operators make
17 decisions, going through the economics,
18 programming and so forth, those factors, and how
19 they evaluate and value programming.

20 And so what I then said prior to this
21 is that as a result of understanding how they do
22 that, I agree with the CARP's finding that

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1 right, and as one lump sum. It's
2 undifferentiated. In fact, if the ratings go up
3 and down during the day, it doesn't affect it one
4 iota --

5 Q This is all clear from your written
6 testimony, but I really just wanted to ask, what
7 did you mean by pro rata?

8 A Perfect question at a perfect time.
9 So with that being the case, right, the cost of --
10 -- he don't have to pay for all of it, each and
11 every hour of it. The cost of each and every
12 hour to the cable system operator is simply
13 dividing that fee, the fees I pay by 24.

14 Q Are you saying that each and every
15 hour on a station is equally valuable to the
16 cable operator?

17 A No. I'm saying that the cost. I
18 didn't say they're value. I said the cost is a
19 pro rata portion of the station's total cost the
20 cable system.

21 Q So you would not say that each and
22 every program on a station is equally valuable?

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1 A I'm sorry. Repeat that. Say it
2 again?

3 Q You would not say that each and every
4 program on a station is equally valuable?

5 A I would not say that.

6 Q So in terms of the value being
7 delivered to the cable system operator, neither
8 the length nor the time of the day it is
9 broadcast, nor the fees paid for the carriage of
10 the station, is an adequate measure of the value
11 that's being delivered to the cable systems?

12 A Yeah. You know, again we're into all
13 of these cascading assumptions, you know, that
14 lead somewhere. I don't know the answer to your
15 statement. I can't, you know, I can't agree with
16 that. What I'm saying here is that the
17 allocating royalties by ratings isn't addressing
18 the value question, right, number one.

19 It's also not addressing the cost
20 question. Because the cost doesn't change by
21 ratings, right. In fairness, the only way I
22 could see doing that is to say well, it's

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1 whatever the cost is, you know, and the royalties
2 paid, right. I mean the cost to the cable
3 operator is, you know, the copyright fee. It all
4 adds up to dollars that are being split amongst
5 the parties.

6 Phase 1 to me does an excellent job of
7 allocating it into these categories, and then
8 Phase 2

9 (Simultaneous speaking.)

10 MR. MACLEAN: Mr. Egan, that's really
11 not the question I asked. Thank you, Your Honor.
12 I have no further questions.

13 JUDGE BARNETT: Mr. Boydston.

14 REDIRECT EXAMINATION

15 BY MR. BOYDSTON:

16 Q Thank you, Your Honor. Mr. Egan,
17 right there at the end, you were giving an
18 explanation as to you were asked a question
19 about, by Mr. MacLean, and in your answer you
20 were explaining that in your view, you're trying
21 to assign value to different program owners, like
22 we are here, that it would sense to pay attention

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1 to certain factors, and you listed one, you were
2 about to list a second. What were the other
3 factors?

4 A I'm simply saying that a formula that
5 allocates royalty dollars by ratings is
6 untethered to either the valuation process or the
7 cost generation process. So it seems to me
8 illogical.

9 Q Thank you. You were asked about how
10 long it had been since you'd been an employee of
11 a CSO, and it had been some time. But since
12 then, as you said, you've been consulting for
13 them; correct?

14 A I have for over 15 years, yes.

15 Q And in that process, is your
16 connection with the CSO world and your
17 interaction and your work similar, if not the
18 same?

19 A Yes.

20 Q I just want to get a distinction here,
21 and I believe I have an understanding about it,
22 but we'll see. There was reference in your

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1 statement to ad sales-supported cable networks.
2 I just want to get a distinction from you between
3 what does cable network mean in that context,
4 versus a cable system operator?

5 My understanding is that a cable
6 network is a completely different kind of animal
7 than a cable system operator; correct?

8 A Right. A cable system operator owns
9 and operates the plant and runs down the streets
10 and feeds signal and bills you monthly. The
11 cable network is network in the sense of soft,
12 software, you know, content and CNN is a cable
13 network. TNT is a cable network.

14 And so the cable system operator
15 negotiates with the network to carry that cable
16 network.

17 Q And ad sales might mean more to a
18 cable system, because we're talking about CNN.
19 They have commercials, and people pay them for
20 their commercials; correct?

21 A In your question, you meant to say
22 important to a cable network.

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1 Q I did, yes, and that's correct.
 2 A Not to say that there isn't some
 3 importance to the cable system operator.
 4 Remember, I told you earlier that, you know,
 5 cable system operator's advertising sales
 6 generates somewhere between zero and ten percent
 7 of their revenue. So they are selling
 8 advertising, and they get local hours in CNN. So
 9 CNN in an hour, the network has about -- well, it
 10 varies a little bit.

11 But let's say that CNN has 12 minutes
 12 of advertising that it's selling, and they grant
 13 the cable system two minutes an hour. So you
 14 know, the cable system sells that and it's a
 15 business. But it's just -- revenue is dwarfed by
 16 the subscriber revenues.

17 Q Understood. You were asked about
 18 several hypotheticals about what would the
 19 situation be where you got two different shows on
 20 channels that are equally priced, and they're
 21 both animal shows, for instance, and one had
 22 better ratings than the other.

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1 In that kind of context, would you not
 2 also be looking at the entire lineup of the
 3 channel, in addition to just the individual
 4 shows, animal shows for instance?

5 A Oh yeah, and I assumed that in the
 6 Judge's question, that we were talking about
 7 ratings for, you know, the 24 hour channel, not
 8 just one show.

9 Q Understood. Talking in the previous
 10 subject with regard to the cable system operator
 11 who, like on CNN, gets a minute or two to put on
 12 like a local TV. It seems like whenever I'm
 13 watching, it's a local car salesman or something
 14 like that.

15 Now the same opportunity, the same
 16 provision doesn't apply -- or is it given to a
 17 cable system operator on -- just on their
 18 retransmitted stations, is it? It's just all
 19 just putting in a feed. You never get a chance
 20 to slice in your own commercials; correct?

21 A That's the way it is today, yes.

22 Q Right, and so for the CSO, looking at

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1 distantly retransmitted signals, he's got no
 2 opportunity to advertise on it, so he's got no
 3 interest in that; correct?

4 A He's got no interest in advertising
 5 sales on that channel; correct?

6 MR. BOYDSTON: Right. I have nothing
 7 further.

8 JUDGE BARNETT: Thank you Mr. Egan.

9 THE WITNESS: Thank you.

10 (Witness excused.)

11 JUDGE BARNETT: We should take a
 12 break. Mr. Olaniran says he thinks we should
 13 take our break, so we'll do so.

14 (Whereupon, the above-entitled matter
 15 went off the record at 2:51 p.m. and resumed at
 16 3:14 p.m.)

17 JUDGE BARNETT: Please be seated.

18 MS. PLOVNICK: MPAA calls Jane
 19 Saunders as a rebuttal witness.

20 JUDGE BARNETT: Okay.

21 MR. BOYDSTON: And Your Honor, we
 22 object to Ms. Saunders testifying as a rebuttal

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1 witness. To begin with, she was designated as a
 2 rebuttal witness. She filed no rebuttal
 3 testimony. She filed a direct statement, but
 4 MPAA waived having her come up and testify as a
 5 direct witness, and closed their direct case.

6 The scheduling order, of course, has
 7 no surprises, but on a more fundamental level,
 8 Ms. Saunders didn't file any written rebuttal
 9 statement. And so I don't understand where the
 10 authority is to allow her to now testify as a
 11 rebuttal witness.

12 She was not designated as a rebuttal
 13 witness, and IPG informed the MPAA that if this
 14 happened, we would challenge on those grounds.
 15 Therefore, I don't see why they are allowed now
 16 to testify as rebuttal witnesses, when they were
 17 never so designated.

18 JUDGE BARNETT: Okay, thank you.

19 MS. PLOVNICK: So first, we did put
 20 Ms. Saunders on our amended witness list that we
 21 filed, I think it was on April 2nd. We did that
 22 after receiving IPG's written rebuttal statement

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1 on March 27th, in which Ms. Saunders' testimony
2 was criticized by Raoul Galaz.

3 We let them know that we wanted to
4 call her as a rebuttal witness to respond to
5 those criticisms that were in the written
6 rebuttal statement, and then also made orally
7 here at hearing yesterday.

8 So and then the Judge's scheduling
9 says specifically that witness are allowed to
10 respond to developments that are germane to their
11 direct or rebuttal testimony at the hearing, and
12 Ms. Saunders is one of our direct witnesses. She
13 testified in the preliminary hearing. We didn't
14 recall her on Monday, to avoid duplication here,
15 because we already had her exhibits admitted in
16 the preliminary hearing.

17 We just didn't see why that would be
18 necessary to drag this out, but we are wanting to
19 call her today to respond specifically to what
20 IPG has raised in the last couple of weeks.

21 MR. BOYDSTON: That constitutes her
22 being a rebuttal witness to a rebuttal. I don't

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1 MR. BOYDSTON: Well then --

2 JUDGE BARNETT: This is not a tennis
3 match. Mr. MacLean, do you have a position?

4 MR. MACLEAN: Your Honor, we were a
5 party to the stipulation that says that direct
6 witnesses were intended to be given the
7 opportunity to respond to oral testimony, and to
8 written rebuttal statements. I think this
9 clearly falls within the intent of that
10 stipulation, as ordered by the Judges. So we
11 have no objection.

12 JUDGE STRICKLER: Could you read that
13 part of the order again?

14 MS. PLOVNICK: Yes. It says -- well
15 I'll just read the whole thing. "The parties
16 shall limit direct examination of witnesses to
17 the introduction of the witness' written direct
18 and rebuttal statements, and a brief opportunity"
19 --

20 JUDGE STRICKLER: A little slower.

21 MS. PLOVNICK: I'm sorry, "and a brief
22 opportunity to respond to points raised in the

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1 think we're going to be allowed to call rebuttal
2 witnesses to their rebuttal. There's no
3 provision for it. All good things must come to
4 an end.

5 Generally we have direct statements,
6 direct case and rebuttal case. They are, by
7 their own words, calling Jane Saunders to rebut
8 things in our rebuttal statement.

9 Now different witnesses in their
10 direct testimony, including Mr. Patrick Gray and
11 we haven't got into it yet, but the same will
12 happen with Dr. Robinson, in their direct
13 statements, in their direct case, are going to
14 respond to the written rebuttal statements filed
15 by the opposition.

16 They'll have that opportunity if they
17 had Ms. Saunders testify in their case-in-chief,
18 but they didn't, because they wanted to wait and
19 hold back and do it now, and I don't think --

20 MS. PLOVNICK: Your Honor, we simply
21 wanted to give Mr. Galaz a chance to testify, so
22 we would be able to respond.

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1 written rebuttal statements, or oral testimony of
2 other witnesses. This limitation shall be
3 enforced in a manner consistent with its intent,
4 which is to avoid repetition and surprise, and
5 not to prevent witnesses from responding to
6 developments that are germane to their direct or
7 rebuttal testimony."

8 And then it says "The Judges will
9 afford the witnesses a reasonable opportunity to
10 introduce themselves during direct examination,"
11 and this is the scheduling order dated March
12 13th, 2015.

13 MR. BOYDSTON: Well, my issue is this.
14 Had they done that in their direct statement,
15 that would have been one thing. They could have
16 done that earlier on Monday, and then we would
17 have had a chance to respond to that when Mr.
18 Galaz testified. Mr. Galaz has now gotten up and
19 sat down, and is not going to stand up again.

20 JUDGE BARNETT: Mr. Boydston, I get
21 your point. If you could just have a seat while
22 I read and think, that would be very helpful.

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1 MR. BOYDSTON: Thank you, Your Honor.
2 (Pause.)

3 JUDGE BARNETT: Ms. Plovnick, was
4 there something in Mr. Galaz's oral testimony
5 that was not in any of his written material?

6 MS. PLOVnick: He expanded at great
7 length yesterday, I think, of things on issues
8 that but I think the topic was in his written
9 testimony, but he expanded on it yesterday in
10 oral testimony. I will also add that we have a
11 pending motion to strike his whole testimony, and
12 not prevent him to testify.

13 And we said in there that we would
14 need to call Ms. Saunders as a rebuttal witness
15 if that motion were granted, but the motion
16 remains pending. So this was another reason why,
17 you know, we had to do this, because if Mr. Galaz
18 had not testified or had not raised any of those
19 issues in oral testimony, or admitted his written
20 rebuttal testimony, we wouldn't have had to do
21 this today.

22 MR. BOYDSTON: Your Honor, they knew

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1 JUDGE BARNETT: Well, I don't think
2 she needs to, because I think that under the
3 circumstances, since we had motions filed on the
4 eve of the hearing and we haven't been able to
5 rule on them or read any responses to them, we
6 have to hear all of the testimony and then
7 conclude after the hearing, after reading your
8 responses and replies, which of it will stay in
9 the record and which will not.

10 MR. BOYDSTON: I understand, Your
11 Honor. It's just that they -- you said that
12 before they went into their case, and they
13 therefore knew that you were withholding your
14 ruling in abeyance when they were in their direct
15 case. Yet for tactical reasons, it appears they
16 held back their witnesses anyway.

17 JUDGE BARNETT: And I heard that when
18 you said it the first time, Mr. Boydston. Your
19 objection's overruled, and Ms. Saunders can
20 testify under the circumstances. As I said, we
21 did not choose for all of these motions to come
22 in on the eve of the hearing. But those are the

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1 before they started what your position was on the
2 motions, that the motions would be decided later
3 on. So during their direct case, they knew that
4 Mr. Galaz was going to get up and testify.

5 Moreover, I'd like to know what
6 subject is new in his oral testimony, because
7 there wasn't anything new. Ms. Plovnick said he
8 went into more detail. I don't know what he went
9 into more detail about. I think what this is
10 going to be about is issues involving the
11 Canadian Copyright Collective. That was front
12 and center

13 JUDGE BARNETT: Well, Mr. Boydston,
14 you just said I don't know what it was, and then
15 you went about supposing that it might be.
16 Please don't.

17 MR. BOYDSTON: All right, I won't.
18 You're right. I'm guessing, okay.

19 JUDGE BARNETT: Not a good idea.

20 MR. BOYDSTON: No. Perhaps Ms.
21 Plovnick can tell us all what she's referring to,
22 because she didn't specify.

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1 facts we work with. We didn't make the facts.

2 So Ms. Saunders can testify in
3 response to Mr. Galaz's specific representations
4 that caused your heartburn, Ms. Plovnick.

5 MS. PLOVnick: Thank you, Your Honor.

6 MR. BOYDSTON: Does that mean that if
7 there are new things or things that are expounded
8 on by Ms. Saunders, we may have an opportunity to
9 similarly bring Mr. Galaz back up?

10 JUDGE BARNETT: Well it says the
11 parties will have a brief opportunity to respond
12 to points raised in written rebuttal statements
13 or oral testimony of other witnesses. We didn't
14 make this stipulation either. You guys did,
15 okay. Okay.

16 MS. PLOVnick: MPAA calls Ms. Saunders
17 to the stand.

18 JUDGE BARNETT: Please raise your
19 right hand.

20 Whereupon,
21 JANE SAUNDERS

22 was called as a witness and, after having been

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1 first duly sworn, was examined and testified as
2 follows:

3 JUDGE BARNETT: Please be seated.

4 REBUTTAL DIRECT EXAMINATION

5 BY MS. PLOVNICK:

6 Q Ms. Saunders, would you please state
7 your name and spell it for the record?

8 A Jane Saunders, J-A-N-E, S-A-U-N-D-E-R-
9 S.

10 Q Now Ms. Saunders, I know you testified
11 already in this proceeding during the preliminary
12 hearing, so we're going to keep this very brief.
13 Just to refresh our memories, let me ask you a
14 few background questions. Are you currently
15 employed by the MPAA?

16 A Yes, I am.

17 Q And what's your position there?

18 A I'm the senior vice president, Rights
19 Management and Policy.

20 Q How long have you been in that
21 position?

22 A I've been in that position as a senior

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1 AGICOA.

2 Q Now is MPAA responsible for royalty
3 distributions in Australia?

4 A No.

5 Q So Ms. Saunders, in your written
6 direct testimony in these proceedings, which was
7 admitted at the preliminary hearing, you
8 discussed the use of viewing by certain
9 international collectives; is that correct?

10 A Actually, in Canada I discussed the
11 use of viewing by the Copyright Royalty Board,
12 which is the equivalent of this body in Canada,
13 and I did discuss viewing as used by AGICOA in
14 Geneva.

15 Q Now Ms. Saunders, are you aware that
16 Mr. Galaz submitted written rebuttal testimony in
17 this proceeding?

18 A Yes, I am.

19 Q Have you reviewed Mr. Galaz's
20 testimony?

21 A I did.

22 Q Do you agree with Mr. Galaz's

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1 vice president for seven years. I have worked
2 for the MPAA just over 20 years.

3 Q At MPAA, are you responsible for
4 managing their retransmission royalty program in
5 the U.S. and internationally?

6 A Yes, I am.

7 Q And you testified before at the
8 preliminary hearing as to all the countries that
9 you're involved with. But just to recap, that
10 includes Canada and Europe; is that correct?

11 A Yes.

12 Q All right.

13 A All the countries of Europe.

14 Q All the countries in Europe. So are
15 you involved in any collection societies or
16 royalty collectives in those countries?

17 A Yes, I am.

18 Q Which ones?

19 A I directly supervise the Copyright
20 Collective of Canada, otherwise known as CCC, and
21 I am a board member, one of 11 on the Executive
22 Committee, now called the Executive Board of

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1 statements about the use of viewing by the
2 Copyright Royalty Collective in Canada and
3 AGICOA?

4 A By the CCC, no, I do not agree with
5 that or with his statements with regard to
6 AGICOA's non-use of viewings.

7 Q Can you explain why not?

8 A Well, it was my understanding -- it is
9 my understanding that both CCC and AGICOA rely on
10 viewing in some measure, to some degree, in
11 distributing royalties their claimants.

12 Q So when you reviewed Mr. Galaz's
13 testimony, what if anything did you do?

14 A I was surprised to see the references,
15 that he had frequent contacts at CCC that
16 confirmed to him that viewing was absolutely not
17 relied upon, and I was surprised by his reference
18 to AGICOA. I think he referred to a website
19 reference, in which he said that it was clear
20 from that AGICOA website that viewing was not
21 relied upon as a basis for distribution.

22 Q So did you take any action as a

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1 result?

2 A I did, I did. I contacted both the
3 executive director of CCC, Lucy Medeiros, and the
4 managing director of AGICOA, Tom De Lange, and I
5 asked them if they would be willing to look at
6 the relevant portions of Mr. Galaz's rebuttal
7 testimony, that affected each of their
8 organizations.

9 Q And did they look at Mr. Galaz's
10 testimony?

11 A They did, they did.

12 Q So -- and I think you said, but who is
13 Lucy Medeiros again?

14 A She's the executive director of the
15 Copyright Collective of Canada.

16 Q And who is Tom De Lange?

17 A He is the managing director. It's
18 essentially the same function at AGICOA. They
19 are in charge of the entirety of the company and
20 the operations.

21 Q Now Ms. Saunders, can you please look
22 at the orange binder that's over there next to

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1 I don't know if we had everyone else's binder at
2 the time, but Ms. Whittle has copies.

3 JUDGE STRICKLER: Judge Feder's
4 holding his binder in his hand. He's holding all
5 of the binders in his hand.

6 (Simultaneous speaking.)

7 JUDGE FEDER: -- have you updated the
8 exhibit?

9 MS. PLOVNIK: All right. And I can
10 give you, if you would like the paper copies I
11 have in mine.

12 JUDGE BARNETT: We can share.

13 MS. PLOVNIK: Thank you.

14 JUDGE BARNETT: Go right ahead.

15 BY MS. PLOVNIK:

16 Q All right. Ms. Saunders, what is MPAA
17 Exhibit 374?

18 A It is a declaration from Lucy
19 Medeiros, Executive Director of the Copyright
20 Collective of Canada.

21 Q And is this the declaration that Ms.
22 Medeiros sent to -- based on your solicitation or

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1 you, and flip to MPAA

2 A It's not in English.

3 Q Yes. This one -- if I may approach
4 the witness, I can help her.

5 JUDGE BARNETT: You may.

6 BY MS. PLOVNIK:

7 Q So you can find the one that's French.

8 A Okay. Here it is. Okay.

9 Q So if you could please flip to MPAA

10 Exhibit 374

11 JUDGE BARNETT: -- 374.

12 MS. PLOVNIK: These are additional
13 exhibits that we added prior to the hearing and I
14 brought them in and gave them to Ms. Whittle, and
15 hopefully they have now made it, now to your --

16 MR. BOYDSTON: Not to my --

17 MS. PLOVNIK: Not to your -- well we
18 also submitted a revised PDF that included those
19 as well so

20 (Off microphone discussion)

21 MS. PLOVNIK: I think Judge Barnett's
22 binder was updated. Oh, so that when I did that,

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1 request?

2 A I -- as I said, I contacted each of
3 Lucy Medeiros and Tom De Lange when I read the
4 rebuttal testimony, and I asked each of them to
5 inform me whether the statements made by Mr.
6 Galaz in that testimony were, his testimony were
7 accurate.

8 After reviewing that testimony, they
9 responded to me directly that several of the
10 statements in his testimony were not accurate,
11 and I asked each of them in turn if they would
12 discuss with my counsel, providing a declaration
13 in this proceeding, to correct the record, and
14 they each agreed. At that point I turned it over
15 to you guys.

16 Q So MPAA Exhibit 374 is the declaration
17 that was received by Lucy Medeiros?

18 A Correct.

19 Q And MPAA Exhibit 375, which is the
20 next exhibit in the binder --

21 A Yes.

22 Q Is that the declaration that was

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1 received from Tom De Lange?

2 A Yes, it is.

3 MS. PLOVNICK: MPAA moves to admit
4 MPAA Exhibits 374 and 375.

5 MR. BOYDSTON: Your Honor, we object.
6 These witnesses are not here to be cross-
7 examined. They were never designated as
8 witnesses at any point. The declaration
9 obviously is hearsay.

10 I know we have a liberal policy of
11 hearsay, declarations have been admitted many
12 times, both submitted by ourselves and by MPAA
13 and SDC and I understand all that, but you have
14 excluded declarations at certain times, and I
15 think this is that sort of a time, particularly
16 because these are witnesses who are testifying
17 about controverted facts, and making very
18 specific accusations about the truth of the
19 statements of another witness, and I have no
20 opportunity to cross-examine them. And on that
21 basis, I object to their admission.

22 MR. MACLEAN: No objection.

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1 about what other witnesses are saying. Most of
2 those declarations were people saying yes, I
3 signed a document. This is different.

4 JUDGE BARNETT: I tend to agree with
5 you, Mr. Boydston, but in an abundance of
6 caution, because we do have these pending
7 motions, I'm going -- we're going to reserve on
8 these two and we'll wait and see what the motions
9 say, what the responses say, and then go from
10 there. So if you have any other questions for
11 Ms. Saunders you may proceed, but we'll reserve
12 on whether these are admitted or not.

13 (Whereupon, ruling was reserved on the
14 admission of above-referred to document marked as
15 MPAA Exhibits No. 374 and 375.)

16 MS. PLOVNICK: May the witness refer
17 to them, since your ruling is reserved? Or --

18 JUDGE BARNETT: Yes. They're -- yes.
19 It'll be entered in the record if we need it and
20 out of the record if we don't, or disregarded if
21 we don't. It won't be out of the record.

22 BY MS. PLOVNICK:

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1 JUDGE BARNETT: Ms. Plovnick?

2 MS. PLOVNICK: Yes, Your Honor we
3 would simply state that in the preliminary
4 hearing we were permitted to offer declarations
5 of witnesses that were not present, in response,
6 in responding to things that were raised in
7 written rebuttal statements.

8 We see this is a similar situation.
9 This is a response to assertions made in a
10 written rebuttal statement. These declarations
11 are also attached as exhibits to our motion to
12 strike, and we -- as we said in there, we --
13 should our motion to strike be granted, we
14 wouldn't have needed to call Ms. Saunders or to
15 bring in these declarations, but there has not
16 yet been a ruling on the motion to strike. So we
17 are offering them as exhibits.

18 MR. BOYDSTON: Your Honor, we received
19 them three business days ago. Again, more
20 important at that, unlike the declarations that
21 you have traditionally admitted in the claims
22 proceeding aspect, these go to substantive issues

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1 Q So Ms. Saunders, did you have
2 conversations with Lucy Medeiros before she
3 executed the declaration?

4 A The conversation I had with Lucy
5 Medeiros was as I think I just said, that I asked
6 her to refer -- review Mr. Galaz's testimony in
7 regards to the statements about CCC and the use
8 of viewing, and I asked her to be in touch with
9 my counsel to provide an alternative to -- to
10 provide accurate information in response to the
11 points that he made in his rebuttal.

12 Q And does Ms. Medeiros provide that
13 accurate information in her declaration?

14 A She does. She told me and Ms. --

15 MR. BOYDSTON: Your Honor, I object to
16 this as hearsay, number one, and number two, the
17 document, if it's admitted, speaks for itself.

18 THE WITNESS: Let me say it another
19 way.

20 JUDGE BARNETT: Sustained. Do you
21 have another question, Ms. Plovnick?

22 BY MS. PLOVNICK:

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1 Q Ms. Saunders, do you know what the
2 accurate CCC royalty distribution, or what the
3 accurate statements are, about CCC's
4 distribution?

5 A That CCC -

6 MR. BOYDSTON: Your Honor, I -- could
7 we have a little more specificity? I object on
8 the grounds it's ambiguous, or leading.

9 JUDGE BARNETT: I don't think it's
10 leading but it is a little ambiguous. Could you
11 restate the question, Ms. Plovnick?

12 BY MS. PLOVNIK:

13 Q So Ms. Saunders, you said that you
14 spoke with Ms. Medeiros regarding this, and you
15 asked her to correct the record. Are you aware
16 what statements Ms. Medeiros identified that
17 needed to be corrected?

18 MR. BOYDSTON: Your Honor, objection.
19 This is the same question, asking her to
20 basically parrot what Ms. Medeiros said.

21 MS. PLOVNIK: I asked if she's aware.

22 JUDGE BARNETT: Sustained.

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1 BY MS. PLOVNIK:

2 Q So Ms. Saunders, are you aware of
3 whether the CCC relies on program viewership
4 ratings for

5 A Yes I am, and yes it does --

6 Q Can you provide --

7 A -- rely on viewership.

8 Q Can you please explain how it does?

9 A The CCC methodology, one of the
10 factors of the CCC distribution methodology
11 relies on program viewership ratings.

12 Q And with regard to AGICOA --

13 JUDGE STRICKLER: Excuse me. I'm
14 sorry, before you go to AGICOA, to your
15 understanding, does the CCC rely on viewership
16 only if, when it's doing the simulcast rating?

17 THE WITNESS: No, Your Honor, it is
18 not, that is not my understanding. I have to
19 confess, the simulcast issue is, for me, a little
20 -- not unclear, but I have never fully -- the way
21 I understand the simulcast issue is that CCC is,
22 attempts to minimize or discount programs when

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1 there is a simulcast, when they're shown
2 distantly in more than two markets at the same
3 time.

4 JUDGE STRICKLER: Well actually,
5 they're, so I understand it, you're here to
6 authenticate the, Ms. Medeiros declaration, or
7 this declaration?

8 THE WITNESS: Yes.

9 JUDGE STRICKLER: Her declaration.
10 You're not here to testify as to how the CCC
11 handles it. It's through her declaration that
12 we're learning about the corrections to Mr.
13 Galaz, the alleged corrections to Mr. Galaz's
14 statements?

15 THE WITNESS: It is certainly true
16 that I'm here to support the declaration or
17 introduce the declaration. That is correct. I
18 am also, however, able to say as a general
19 matter, that CCC relies upon viewing when it
20 performs its distribution, and I can say that in
21 my capacity as supervisor of Lucy Medeiros of the
22 CCC. In other words --

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1 JUDGE STRICKLER: I'll tell you what.
2 Excuse me. I'll tell you my confusion, because
3 in Article 8 of the CCC that you, that's
4 referenced in the declaration and that you
5 referenced, the concept of viewing rate is not
6 mentioned with regard to the relative amount of
7 viewing until after the simulcast weighting,
8 isn't that right?

9 THE WITNESS: That is -- I believe
10 there's an order of go in terms of how they apply
11 their factors. That's correct. I would love to
12 see Article 8 because I think, to me the relevant
13 portion of --

14 MS. PLOVNIK: I believe that's --

15 JUDGE STRICKLER: Still of --

16 MS. PLOVNIK: -- an item of IPG's
17 exhibits.

18 JUDGE STRICKLER: IPG Exhibit 163, if
19 somebody could put that in front of the witness.

20 MS. PLOVNIK: 163, if I may approach.

21 JUDGE BARNETT: Is it -- I think it's
22 --

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1 MS. PLOVNICK: Well that's --
 2 JUDGE BARNETT: They have to be
 3 numbered. I don't see a one.
 4 MS. PLOVNICK: It's --
 5 MR. BOYDSTON: The first exhibit in
 6 the second binder. May I approach, Your Honor?
 7 JUDGE BARNETT: You may. We would --
 8 it's not too --
 9 MS. PLOVNICK: It's the first exhibit.
 10 MR. BOYDSTON: The first in the second
 11 binder.
 12 JUDGE BARNETT: Okay, got it. We got
 13 thank you. Okay, so we're talking about
 14 Article 8.
 15 THE WITNESS: So, there go -- it goes
 16 through a narrative that attempts to describe in
 17 as best as a distribution rule can describe, how
 18 the weights are -- how the distribution is
 19 undertaken, and how each show is compensated, or
 20 how royalties are allocated to each show that is
 21 paid for.
 22 And it goes -- as I said, there's an

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1 amount of viewing of CCC shows on distant signals
 2 on the applicable day of the week and during the
 3 applicable time period when the retransmission
 4 occurs.
 5 JUDGE STRICKLER: So because that
 6 sentence makes reference to multiplying the
 7 viewing rate by simulcast weight, does that not
 8 mean that that concept only applies when you have
 9 a simulcast weighting?
 10 THE WITNESS: Well it -- yes, except
 11 that I believe that some of the simulcast
 12 weightings are basically zero, or maybe it's a
 13 hundred. In other words, there's no -- when this
 14 -- the simulcast weight is always applied but
 15 sometimes the simulcast weight has no influence,
 16 has no relevance because there is no simulcast,
 17 because not every distantly retransmitted show,
 18 in my understanding, is simulcast.
 19 JUDGE STRICKLER: But if the simulcast
 20 weight was zero, that sentence says the viewing
 21 rate is then calculated by multiplying the
 22 simulcast weight. That would give a program zero

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1 order of go in terms of how they --
 2 JUDGE STRICKLER: Are you saying, an
 3 order of go?
 4 THE WITNESS: Yes.
 5 JUDGE STRICKLER: What does that mean?
 6 THE WITNESS: I'm sorry, yes. So,
 7 they determine the viewing rate. The way it
 8 works, weight is calculated starting with the
 9 determination of its supply weight, next the
 10 simulcast weight, if any. I don't think that
 11 every show has a simulcast weight, or maybe they
 12 all do but some of them have -- there's no
 13 diminution because there's no simulcast.
 14 And then, after all of that, dot da
 15 dot da dot, the viewing rate, let me read this,
 16 the last sentence --
 17 JUDGE STRICKLER: The viewing rate,
 18 the penultimate sentence, actually?
 19 THE WITNESS: The penultimate
 20 sentence, yes sir. Yes. The viewing rate is
 21 then calculated by multiplying the simulcast rate
 22 by viewing factors which reflect the relative

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1 viewing rate --
 2 THE WITNESS: Yes.
 3 JUDGE STRICKLER: -- which doesn't
 4 make any sense.
 5 THE WITNESS: I totally agree with
 6 Your Honor and I wish that I understood more
 7 about the mechanics. What I understand is in a,
 8 in the sense of words, not of numbers, and it is
 9 as I have, I am trying to explain, is that if
 10 there is no simulcast, there is no impact of
 11 simulcast diminution in the royalty value based
 12 upon a simulcast if one does not occur.
 13 JUDGE STRICKLER: Okay.
 14 THE WITNESS: That's the best way that
 15 I can articulate that. But that the viewing, the
 16 relative amount of viewing, on the applicable day
 17 of the week and during the applicable time
 18 period, is also relevant, as is said in the
 19 penultimate sentence.
 20 JUDGE STRICKLER: Thank you.
 21 BY MS. PLOVNICK:
 22 Q Ms. Saunders, with regard to AGICOA,

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1 I believe you testified at the preliminary
2 hearing that you're on the board of AGICOA?

3 A Yes.

4 Q So Ms. Saunders, are you aware if --
5 does AGICOA use program viewing measurements?

6 A As a matter of fact, I am extremely
7 aware of that, not only in my capacity as a board
8 member but also in my, from my days as being on
9 the Identification Commission from AGICOA, and
10 having been as a board member, we are all
11 informed of any promulgation of distribution
12 rules, of updating of distribution rules, and so
13 I am extremely aware of the AGICOA distribution
14 program, and I know that they take account of
15 viewing, and wherever possible, I also know,
16 because I'm also on the finance committee of
17 AGICOA and I therefore am involved in the budget,
18 including budgeting items for purchasing of
19 viewing, that viewing is purchased wherever
20 possible and used per program.

21 Q So, Ms. Saunders, could you please
22 turn to IPG Exhibit 152, which I think may be in

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1 fingers on it at this moment. Oh, wait a minute.
2 One second.

3 Q Ms. Saunders, if you could look at the
4 first page of Exhibit -- IPG Exhibit 152.

5 A The first page?

6 Q That's the exhibit that I have in my
7 binder.

8 A It says, definition of work, what
9 times of work can I declare.

10 Q Oh, you know, I may have a different
11 number.

12 A Oh, I'm so sorry. I was looking at
13 the wrong page. Now I see it. Okay. Yes, I do.
14 There I thought I was losing my mind for a
15 second, so yes.

16 Q And what language --

17 A In the matching of broadcasts, on the
18 first page of IPG Exhibit 152, in the second
19 paragraph, matching of broadcasts, the words are,
20 "Having allocated royalties to broadcasts on the
21 basis of duration and audience, AGICOA then
22 identifies the right holders for each of the

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1 the other IPG binder, if I may approach. I will
2 --

3 JUDGE BARNETT: Yes.

4 MS. PLOVNICK: -- see if I can seek
5 out that one.

6 THE WITNESS: Oh wait. That one I
7 have to - wait, one?

8 BY MS. PLOVNICK:

9 Q 152?

10 A Oh I'm sorry. There's some numbers on
11 the back and some on the front. That's what was
12 confusing. Okay. Yes.

13 Q And what is IPG Exhibit 152?

14 A It appears to be -- oh, it is a page
15 lifted from the - copied from the website of
16 AGICOA, which addresses the distribution rules of
17 AGICOA.

18 Q Is there any language on IPG Exhibit
19 152 that makes reference to viewing?

20 A There is, there is, there is. I'm
21 just trying to find -- I know there's a reference
22 to use of audience data, but I cannot lay my

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1 broadcasts based on their declared rights on
2 audio visual work." I can see that language on
3 the website needs some updating since the grammar
4 is not great there.

5 Q But so, what does the use of the word,
6 audience mean in that sentence?

7 A It means the measured audience for the
8 viewing.

9 MS. PLOVNICK: All right. I have no
10 further questions for Ms. Saunders at this time.

11 JUDGE BARNETT: Mr. MacLean, any
12 questions for Ms. Saunders?

13 MR. MACLEAN: No, Your Honor.

14 JUDGE BARNETT: Mr. Boydston?

15 MR. BOYDSTON: Yes, Your Honor. Thank
16 you.

17 CROSS-EXAMINATION

18 BY MR. BOYDSTON:

19 Q Good afternoon, Ms. Saunders. I'm
20 Brian Boydston, counsel for IPG. Let me ask you
21 to look at Article 8 again.

22 A I do.

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1 Q And before we get into the specifics
2 of that well, no. Let's get into the
3 specifics of that. Okay, now temporary, could
4 you just

5 MR. MACLEAN: Your Honor, what is the
6 exhibit number?

7 MR. BOYDSTON: I don't -- beg your
8 pardon, Your Honor. It is Exhibit 163.

9 MR. MACLEAN: Thank you.

10 MR. BOYDSTON: And it's the third
11 page.

12 MR. MACLEAN: Got it.

13 BY MR. BOYDSTON:

14 Q Now, the first sentence I'll read,
15 "Allocations of all royalties to be given work
16 are determined by the work share of the combined
17 weight of all works in CCC's data for that year"
18 dash, "the work's Viewing Weight." And the
19 viewing weight is capitalized, correct? My
20 understanding is because viewing weight is
21 capitalized, it's being characterized as a term
22 of art. Is that your understanding?

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1 A I --

2 Q Or a defined term, I should say, not
3 a term of art.

4 A I do not take that to be a defined
5 term, quite honestly, Mr. Boydston. I don't. I
6 have no it's capitalized, yes. It may be, but
7 I don't even think it's a term of art, quite
8 frankly.

9 Q Well, they're not -- the next sentence
10 says, "Each work's weight reflects its duration,
11 the number" -- let me stop there. By duration,
12 do you interpret that to be something other than
13 its length?

14 A No, I do not.

15 Q Then it continues, "the number of
16 Canadian retransmitters subscribers that received
17 the work on a distant television signal," -- I'll
18 stop there. Would you agree with me that that
19 means essentially what it says? It's a tally of
20 how many subscribers could have seen the work in
21 question, because they were subscribers?

22 A I do not know if it could -- if it's

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1 subscribers that could have received the signal,
2 no. It could be the subscribers that actually
3 did, based on --

4 Q And that makes you -- what in that
5 phrase suggests that to you?

6 A My comprehension of the English
7 language.

8 Q Okay. Then it continues, "and the
9 share of overall viewing experienced in the day
10 part of the day of the week and in the season
11 when the work was retransmitted." Now, that last
12 phrase, is it your interpretation that that
13 refers to something other than the amount of
14 people viewing -- or excuse me, the day part in
15 which it was viewed?

16 A Okay. So the share of overall viewing
17 experienced in the day part on the day of the
18 week in the season, in the day of the week and in
19 the season when the work was retransmitted. What
20 -- you're asking me if I understand that to refer
21 to audience or viewing? Because I do.

22 Q Do you think it refers to ratings?

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1 A Measured viewing.

2 Q Well, yes or no?

3 A Yes.

4 Q Now, do you actually make computations
5 pursuant to Article 8?

6 A Never in my whole life. I pray to God
7 that doesn't happen.

8 Q Have you ever been involved with
9 people who were doing it or overseen it,
10 specifically?

11 A No, never specifically.

12 Q Now, it continues for another couple
13 of sentences, and then in the middle of the
14 paragraph it says, "Next, the simulcast weight" --
15 -- you see that?

16 A Yes.

17 Q "-- is determined by adjusting supply
18 weight," and it continues. Is it your -- strike
19 that. Do you know what simulcast weight means?
20 Now there is words here that describe it, but do
21 you have an understanding of it yourself?

22 A It means that no value is added if you

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1 continue on in this article.

2 Q Well actually what I'm asking if you
3 know what simulcast weight is to begin with?

4 A Yes. Simulcast weight, as I was
5 attempting very unartfully to explain to Judge
6 Strickler, has to do with a diminution of value
7 to the extent -- in the royalties paid to the
8 extent that the work is broadcast, or
9 retransmitted, excuse me, in more than one
10 distant market at the same time.

11 Q And so, the simulcast weight, I think
12 what your saying is, is only a factor if, in
13 fact, there's a simulcast circumstance going on?

14 A That is my understanding, yes.

15 Q And that's what's said, I think, in
16 the second to last sentence, which begins, "The
17 viewing weight is then calculated," correct, "by
18 multiplying the simulcast weight by viewing
19 factors." correct?

20 A Yes.

21 Q So in other words, the second to last
22 sentence is saying, if there is a simulcast

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1 discusses any analysis on a program by program
2 basis.

3 A No, because the distribution rules are
4 written in a fairly general way, they're not
5 updated on the website as frequently as they are
6 updated in live, in real life.

7 Q Okay. Are you familiar enough -- are
8 you generally familiar with the AGICOA criteria
9 for this distribution?

10 A I'm extremely familiar with the AGICOA
11 criteria, for all the reasons I said when I was
12 talking to Ms. Plovnick.

13 Q And part of that criteria is a
14 function of day part viewing, is it not?

15 A No. It is -- well, let me rephrase.
16 In cases where AGICOA is able to buy program-
17 specific viewing, so I Love Lucy is -- which I
18 believe isn't transmitted any more, but let's
19 just use that, is retransmitted in Germany on X
20 day at that time, if those ratings, if that
21 audience measurement is available to buy it is
22 purchased and used, and that's why the language

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1 weight, then we multiply it by the viewing
2 weight, correct?

3 A If there is a simulcast weight, I
4 believe well, you know, I can't really opine.
I was going to say that I believe -- I think I
6 know how it's done, but I'm not going to opine
7 because I'm not certain. I've never directly
8 done it myself.

9 Q Okay. You'd agree with me that the
10 word ratings doesn't appear anywhere in here,
11 does it?

12 A No, but that has --

13 Q Well is that -- does it appear or not?
14 That's my question.

15 A No, it does -- absolutely, the word
16 ratings never appears.

17 Q Okay.

18 A Or on the AGICOA website, for that
19 matter.

20 Q Let's turn to the AGICOA website.
21 That would be Exhibit 152. And now, on this
22 first page here, I don't see anything here that

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1 here in the middle says, "Having allocated
2 royalty broadcast to broadcast on the basis of
3 duration and audience, AGICOA then identifies,"
4 et cetera, et cetera.

5 Q And again, audiences are defined,
6 audience means, could mean --

7 A No, it couldn't --

8 Q Well let me -- I haven't even put it
9 into a question yet. I know what you said you
10 think audience means, but again, the word ratings
11 doesn't appear in here, anywhere in this, that
12 particular page, does it?

13 It doesn't say that -- in that
14 particular page, I think you'd agree with me that
15 in that particular page, it doesn't say that the
16 -- that when they refer to audience, they're
17 measuring audience by ratings as opposed to by
18 day part or some other factor. Would you agree
19 with me there?

20 A What I would agree with is that --

21 Q Well that's, that's depending on --
22 again, that's the question. Do you agree with me

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1 that that is not --

2 A I would not, I would not agree. I
3 would agree that someone who picked up the
4 website and looked at it might possibly draw that
5 conclusion, yes.

6 Q Thank you. Because in that page, the
7 words ratings don't appear, correct?

8 A That's right.

9 Q Okay. Let's move on to the same
10 exhibit, and that, the pages aren't really
11 numbered, so I'm going to have to count. It
12 would be, let's see, one, two, three, four, five,
13 six, seven, eight, nine, the ninth page. At the
14 top it says, remuneration.

15 A Got it.

16 Q And the -- and this is a bunch of
17 question and answers, and the third from the
18 bottom, there is a question that says, "How much
19 will I get paid for my works?" You see that?

20 A Yes.

21 Q The seminal question we're all here
22 for.

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1 pay solely on the ratings without a factor for
2 duration, otherwise how would you know when to
3 stop measuring the ratings?

4 Q All right. There is an excellent
5 point, why I think it's a good metric. The next
6 sentence begins, "A prime time retransmission of
7 a work with a duration of 60 minutes in an
8 important TV retransmission market like the
9 Netherlands would yield a larger amount than a
10 smaller market like Slovenia. Period.

11 And then the final sentence says,
12 "Also, a retransmission during prime time will
13 yield more than retransmission at any other
14 time."

15 JUDGE STRICKLER: Because it's at
16 other time, is that okay?

17 MR. BOYDSTON: Oh thank you. I'm
18 sorry. At other time.

19 THE WITNESS: Yes, again --

20 MR. BOYDSTON: We don't need to --
21 yes. Some of those ground rules moving quickly.

22 BY MR. BOYDSTON:

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1 A Right.

2 Q The answer is, it says, it starts out,
3 "The amount you'll get paid depends upon the
4 overall amount AGICOA collects in a given
5 country. The specific calculation of the amount
6 you will get is itself based on non-
7 discriminatory, objective criteria.

8 A Yes.

9 Q So clearly this is going to
10 potentially answer the question, what's the
11 criteria, right?

12 A Such as, are the next words.

13 Q Right, so "such as the duration of the
14 work." Period. So, obviously that's one of the
15 factors AGICOA used, is how long the program is,
16 correct?

17 A Correct. That is correct.

18 Q So right there we know that AGICOA is
19 not basing its distribution solely on ratings,
20 but at least in part on duration of the work. Is
21 that true?

22 A It is true. It would be impossible to

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1 Q Clearly that last sentence is
2 referring to a day part analysis. Would you
3 agree with me?

4 A I -- no. No. It refers to the
5 reality --

6 Q You don't know --

7 A No. It refers to the reality that
8 more people watch TV, and therefore the audience
9 rating or measurement would be greater in prime
10 time as a general rule. It's a website --

11 Q Right.

12 A -- reference.

13 Q Is it your testimony that the notion
14 that people watch more in prime time than 3
15 o'clock in the morning, are you saying that's not
16 a day part analysis?

17 A As a general rule, I think that's an
18 accurate way to reflect in a general way, the way
19 that the distribution process works.

20 Q I agree. To me that sounds like a day
21 part viewing analysis. Do you disagree?

22 A I do.

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1 MR. BOYDSTON: Okay. Nothing further.
 2 JUDGE STRICKLER: Quick question for
 3 you, Ms. Saunders. In the AGICOA document, there
 4 is no reference to the use of ratings for
 5 valuation for distribution purposes. Am I
 6 right?
 7 THE WITNESS: No sir. It is --
 8 there's a reference to audience only. There is
 9 no reference to ratings. That's correct.
 10 JUDGE STRICKLER: If ratings are, in
 11 fact, used for distribution purposes through
 12 AGICOA, do you find it odd that there's no
 13 reference to ratings at all in the document?
 14 THE WITNESS: No, no. Because this
 15 document was written by Francophones, or possibly
 16 someone else who had it translated into English.
 17 No, it doesn't strike me as odd at all.
 18 JUDGE STRICKLER: How about, going
 19 back to the document with regard to the Canadian
 20 Collective.
 21 THE WITNESS: There's no reference --
 22 JUDGE STRICKLER: Now there's no

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1 reference to ratings at all, do you -- they --
 2 sometimes they're Francophones and sometimes
 3 they're not.
 4 THE WITNESS: Yes. Not in this case.
 5 Not in the case of the people that wrote those
 6 rules. They're not Francophones.
 7 JUDGE STRICKLER: So, do you find it
 8 unusual or odd that there's no reference to
 9 ratings at all in the Canadian Collective
 10 document?
 11 THE WITNESS: The reference to viewing
 12 or viewership, I think, to me is equivalent, and
 13 I am sure that that was simply a choice.
 14 JUDGE STRICKLER: That you -- a choice
 15 of language that you --
 16 THE WITNESS: The -- yes, a choice of
 17 language, excuse me, yes.
 18 JUDGE STRICKLER: So you treat
 19 viewership as equivalent --
 20 THE WITNESS: Yes.
 21 JUDGE STRICKLER: -- to ratings?
 22 THE WITNESS: Yes.

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1 MR. BOYDSTON: I have nothing further,
 2 Your Honor.
 3 MR. MACLEAN: Your Honor, could I very
 4 quickly cross again based on what's been asked
 5 and what -- by Judge Strickler and Mr. Boydston?
 6 JUDGE BARNETT: Oh yes, I'm sorry.
 7 MR. MACLEAN: Can I do it from here?
 8 JUDGE BARNETT: If you speak up.
 9 MR. MACLEAN: Thank you. I will.
 10 CROSS-EXAMINATION
 11 BY MR. MACLEAN:
 12 Q Ms. Saunders, could you -- and I
 13 apologize, but could you remind me of what your
 14 position is with the CCC?
 15 A I am -- I supervise the executive
 16 director of the CCC and all of the CCC staff.
 17 Q In that capacity, you are in some
 18 measure, and perhaps even a great measure,
 19 responsible for much of the operations of the
 20 CCC?
 21 A I am fully responsible, along with the
 22 executive director, for the operations of the

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1 CCC.
 2 Q Does this -- in conducting this
 3 process, this royalty distribution process, does
 4 the CCC acquire ratings data?
 5 A I believe that they do. I know that
 6 -- you're asking me a hard one now, because I do
 7 approve the budget, but they acquire broadcast
 8 data and they -- I don't know the answer. I'm so
 9 sorry. I would love to say yes. I'm sure that
 10 the answer is yes. But I can't 100 percent.
 11 They have to, but I can't recall. I'm so sorry.
 12 Q Same question with respect to AGICOA,
 13 do they acquire ratings?
 14 A Yes. That I know of, because I'm on
 15 the finance committee and I have to review and
 16 approve the budget. Lucy does that for us at
 17 CCC, reviews and approve the budget, or puts the
 18 budget together.
 19 Q Lucy?
 20 A Medeiros, excuse me, yes, the
 21 executive director.
 22 Q So that AGICOA -- because you review

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1 and approve the budget, or because you
2 participate in the review and approval of the
3 budget, you know that AGICOA acquires ratings
4 data for use in this process?

5 A Yes, I do.

6 Q It is enormously expensive?

7 A It is enormously expensive.

8 Q Is there any reason why you would
9 acquire that enormously expensive data if you
10 were not going to use it?

11 A No. None that I can think of.

12 Q Thank you.

13 JUDGE STRICKLER: Could I have a
14 question for you, Ms. Saunders?

15 THE WITNESS: Yes.

16 JUDGE STRICKLER: With regard to
17 acquiring viewership ratings information as
18 counsel just asked you about, is that necessarily
19 separate and apart from making any determinations
20 as to value, in general? Is it also necessary,
21 when you're doing the simulcast allocations, to
22 have the viewership ratings?

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1 THE WITNESS: You would have to have
2 the incidence of retransmission of the signal
3 into the market, Your Honor. I don't know that
4 you would need to know how many viewers received
5 it in a market. Again, I am not 100 percent
6 sure. I apologize. I don't have a very good
7 familiarity with the simulcast.

8 JUDGE STRICKLER: I'm going back to
9 that penultimate sentence in Exhibit 163, which
10 says --

11 THE WITNESS: Yes, yes.

12 JUDGE STRICKLER: In the simulcast
13 context

14 THE WITNESS: Yes.

15 JUDGE STRICKLER: Tell me when you're
16 with me. Okay?

17 THE WITNESS: Yes, yes.

18 JUDGE STRICKLER: The viewing weight
19 is then calculated by multiplying the simulcast
20 weight by viewing factors, which reflect the
21 relative amount of viewing --

22 THE WITNESS: Right.

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1 JUDGE STRICKLER: -- of CCC shows on
2 distant signals.

3 THE WITNESS: Right.

4 JUDGE STRICKLER: Et cetera. So if
5 for no other reason, anyway -- they may have
6 other reasons as well, but for no other reason,
7 am I correct that you would need ratings
8 information simply to perform the task that's
9 suggested in that second -- in that penultimate
10 sentence?

11 THE WITNESS: You would need ratings
12 information to perform the task in, that's
13 described here, but you would not -- I don't
14 think you would need -- and I'm a little bit out
15 of my expertise here, but I don't think you need
16 ratings specifically for the simulcast
17 determination because it has to do with the
18 market.

19 So the retransmission impact in a
20 market -- so the city is basically discounted, or
21 the reception zone of the signal is discount
22 whereas that part, that market is not included in

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1 determining the value of royalties that are going
2 to be distributed.

3 I'm saying this in a really confusing
4 way. I wish I could find a way to say it in a
5 less confusing way.

6 JUDGE STRICKLER: Well, it sounds to
7 me -- maybe I'm wrong, but the sentence speaks
8 for itself, because it says, "The viewing weight
9 is then calculated by multiplying the simulcast
10 weight by viewing factors, which reflect the
11 relative amount of viewing of CCC shows on
12 distant signals on the applicable day of the week
13 and during the applicable time period when the
14 retransmission occurred."

15 THE WITNESS: Right.

16 JUDGE STRICKLER: That sound to me,
17 anyway, like you're talking about ratings
18 necessary to see how much viewing was occurring
19 on the retransmitted station.

20 THE WITNESS: I agree with you. It
21 does sound that way. When I look up here to
22 simulcast weight, the definition of how it's

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1 determined, it says, "The simulcast weight is
2 determined by adjusting the supply weight." So I
3 think it -- that factor impacts the supply
4 weight.

5 In other words, if it's a two-hour --
6 if it's a one-hour show and it's retransmitted
7 twice, it doesn't get the full value of the two
8 hours, that's right.

9 JUDGE STRICKLER: My point was a much
10 more specific point in that which is simply that
11 counsel was trying to establish with you that you
12 acquire ratings information, and it may be the
13 case that you acquire ratings information for
14 that reason, not for any additional reason,
15 although it may be for an additional reason.

16 THE WITNESS: It could be. I'm going
17 to make it my personal mission to learn all about
18 simulcast weighting, as soon as I leave here
19 today.

20 JUDGE STRICKLER: Well that's all well
21 and good, but since you haven't done -- made it
22 your personal mission yet --

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1 record, we have the same objection to Ms. Martin
2 as we do to Ms. Saunders. The circumstances are
3 the same, therefore we object to Ms. Martin's
4 testimony.

5 MS. PLOVNICK: Your Honor, the
6 circumstances are actually not the same. Ms.
7 Martin's direct testimony was admitted by
8 stipulation by IPG, and then when Mr. Galaz
9 testified yesterday he went at length to
10 criticize Ms. Martin's testimony orally. In his
11 written rebuttal statement, all he simply does is
12 reference, at least the one directed at MPAA,
13 simply just references IPG Exhibit 150 and
14 doesn't have any further analysis or description.

15 But yesterday in oral testimony he
16 went at length to go and really challenge Ms.
17 Martin's credibility and the credibility of her
18 data, which is a part of MPAA's analysis. So we
19 are calling her as a rebuttal witness to respond
20 to that oral testimony of Mr. Galaz yesterday.

21 MR. BOYDSTON: Your Honor, the
22 situation is slightly different as Ms. Plovnick

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1 THE WITNESS: I have not.

2 JUDGE STRICKLER: That doesn't help me
3 a whole lot, does it?

4 THE WITNESS: I have not. I'm so
5 happy everyone asked me all these questions about
6 it.

7 JUDGE BARNETT: Anything further, Ms.
8 Plovnick?

9 MS. PLOVNICK: I have nothing further,
10 Your Honor.

11 JUDGE BARNETT: Anything further based
12 on Judge Strickler's questions?

13 MR. BOYDSTON: No, Your Honor.

14 MR. MACLEAN: No, Your Honor.

15 JUDGE BARNETT: Thank you, Ms.

16 Saunders. You may step down.

17 (Witness excused)

18 JUDGE BARNETT: Ms. Plovnick, you have
19 one more witness today?

20 MS. PLOVNICK: Yes. So the MPAA calls
21 Jonda Martin.

22 MR. BOYDSTON: Your Honor, for the

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1 stated, because Ms. Martin did present a written
2 statement. However, we are not challenging the
3 issues about the CDC data that we brought up
4 yesterday have nothing to do with any challenge
5 of ours at the MPAA. That's why there's nothing
6 in our written statement or rebuttal statement
7 attacking the MPAA's use of the CDC data.

8 We have no problem with their use of
9 the CDC data in any condition. So -- and we'll
10 agree to that here and now if it will take care
11 of Ms. Jonda's, Ms. Martin's testimony. We have
12 no challenge to the MPAA's use of the CDC data.

13 MS. PLOVNICK: I'm a little confused
14 because -- so we perceived that the testimony
15 that Mr. Galaz stated yesterday to be directed at
16 Ms. Martin and her credibility and her CDC data
17 and analysis.

18 MR. BOYDSTON: No, it's not.

19 MS. PLOVNICK: This is not what --

20 MR. BOYDSTON: No, it's not. Your
21 Honor, the MPAA only uses the CDC data in the
22 process of choosing its satellite station lineup

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1 for the purposes of its methodology. We have no
2 issue with that. It's fine. So, you know, our
3 observations about mistakes that the CDC made
4 have nothing to do with that. And I will
5 stipulate to that.

6 JUDGE STRICKLER: So what do the
7 mistakes that the CDC made with its data have to
8 do with -- what was the point of it?

9 MR. BOYDSTON: Dr. Erdem relies upon
10 it. He relies upon those numbers, and in fact as
11 you may recall, he had even tell us that he saw
12 the one error where it was 400 and something
13 million instead of two, and he made a change, but
14 there are a whole bunch more which is why we're
15 showing it.

16 JUDGE STRICKLER: So his expert
17 testimony, according to your position, is based
18 on a foundation, not so good. Foundation has
19 data errors and the data errors are CDC data
20 errors?

21 MR. BOYDSTON: That's correct.

22 JUDGE STRICKLER: Isn't -- are you

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1 have no issue. We will stipulate that the CDC
2 data, with whatever issues it may have, does not
3 impinge on the MPAA methodology one iota. It
4 doesn't -- it will not change, will not -- we
5 have no attack on them in that regard.

6 Our point is that Mr. Erdem relied
7 upon it, and it has problems. So it's not an
8 attack on the MPAA. It happens to be that the
9 MPAA has Jonda Martin as a witness, but we aren't
10 attacking their use of her or their creation.
11 We're attacking the use by the SDC of that
12 information. And she is obviously not their
13 witness. They didn't designate her, and so
14 that's that.

15 MR. MACLEAN: Your Honor, I think
16 there's a false premise in Mr. Boydston's
17 argument. Dr. Gray uses the same CDC data as
18 part of his regression analysis to predict
19 distant viewership.

20 MR. BOYDSTON: With respect, no he
21 doesn't. He only uses CDC data to choose
22 stations he is going to look at, and we have --

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1 proffering Ms. Martin to be able to rebut that
2 particular point?

3 MS. PLOVNICK: Well, our -- so Ms.
4 Martin provided data that Dr. Gray uses at his
5 sample, and it's CDC data, CDC satellite data.
6 So --

7 JUDGE STRICKLER: You can tell us.
8 It's --

9 MS. PLOVNICK: Exactly. So what she
10 does I mean, I'm hearing now he's going to
11 stipulate that there are no errors in Ms.
12 Martin's CDC --

13 MR. BOYDSTON: No, I'm not going
14 stipulate that there are no errors. I'm going to
15 stipulate that their problem with her methodology
16 that arises out of those numbers, we have no
17 issue with it, what IPG is using.

18 JUDGE BARNETT: Understood. The point
19 is, I believe, that IPG attacked the reliability
20 of the CDC data, not that some other party might
21 have chosen to rely upon it. Is that correct?

22 MR. BOYDSTON: What -- we did, but we

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1 for satellite, and we have no objection to that.
2 And, you know what, if he turns around tomorrow
3 and says that I use it in my regression analysis
4 as well, bully for him. We will not object. We
5 don't have a problem with it.

6 MR. MACLEAN: It's described in his
7 written direct testimony. At any rate, we join
8 in -- I mean, clearly, they're challenging SDC.
9 We join in Ms. Plovnick's request to call Jonda
10 Martin.

11 JUDGE BARNETT: Well, there's been a
12 fundamental attack on the reliability of the CDC
13 data by Mr. Galaz. I remember, and I also just
14 checked my notes, and it's there.

15 MR. BOYDSTON: And it's true.

16 JUDGE BARNETT: Okay, thank you.
17 Overruled. Do you have a written objection on
18 this, or is this -- no. Because this was a last
19 minute --

20 MR. BOYDSTON: Yes.

21 MS. PLOVNICK: This is in response to
22 oral testimony yesterday, Your Honor.

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1 JUDGE BARNETT: Okay. You may call
2 Ms. Martin.
3 MS. PLOVNIK: Okay. MBAA calls Ms.
4 Martin to the stand. And for the record, we
5 appreciate IPG's stipulation that --
6 MR. BOYDSTON: Well it's not now. I
7 withdraw it.
8 WHEREUPON,
9 JONDA MARTIN
10 was called as a witness by Counsel for the Motion
11 Pictures Association of America and, having been
12 first duly sworn, assumed the witness stand, was
13 examined and testified as follows:
14 JUDGE BARNETT: Please be seated.
15 DIRECT EXAMINATION
16 BY MS. PLOVNIK:
17 Q Ms. Martin, can you please state your
18 name and spell it for the record?
19 A Jonda Martin, J-O-N-D-A, Martin, M-A-
20 R-T-I-N.
21 Q Ms. Martin, where do you work?
22 A Cable Data Corporation.

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1 Q And what does Cable Data Corporation
2 do?
3 A We were created to compile the
4 voluminous paper statements of account filings
5 and turn them into electronic database for
6 reporting and analysis.
7 Q And is a Cable Data Corporation
8 sometimes referred to as CDC?
9 A Yes.
10 Q So when did you start working for CDC?
11 A Almost 27 years ago, 1988.
12 Q And what were your duties and
13 responsibilities at that time?
14 A At that time, primarily research and
15 data entry.
16 Q Did those responsibilities change over
17 time?
18 A They did.
19 Q And what are your responsibilities
20 presently?
21 A Currently I'm the president of Cable
22 Data. I oversee all of the operations, the

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1 management of the data and consulting and
2 distribution of the data.
3 Q Can you describe the process CDC uses
4 to collect SOA information?
5 A Yes. I have a full time staff,
6 largely here at the Copyright Office every day.
7 We scan, compile and data enter the data into our
8 database.
9 Q And for the record, what is an SOA?
10 A It's a statement of account. There
11 are cable statement of account and satellite
12 statements of accounts.
13 Q So once your employees here at the
14 Copyright Office on location collect data from
15 SOAs, what do they do with it?
16 A Well, that -- for the period of the
17 data that we're dealing with now, they used to
18 bring them back -- bring their laptops from which
19 they've gathered the data back to the database
20 and upload it to the mainframe, but now we have
21 everything linked on the cloud.
22 Q Does CDC produce reports from the data

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1 that it gathers?
2 A We do. They're the standard reports
3 that the majority of the parties receive, and we
4 also do specific custom reports for clients.
5 Q Now, does CDC collect both cable and
6 satellite SOA information?
7 A We do.
8 Q So who uses CDC data?
9 A Several parties, most of the parties
10 in this room, if not all. And television
11 stations, group owners, cable systems and so
12 forth.
13 Q Does IPG use CDC data?
14 A Yes.
15 Q Do they use both cable and satellite
16 CDC data?
17 A I believe primarily cable data. We've
18 talked about satellite data, but I believe IPG
19 compiled their own.
20 Q All right. So Ms. Martin, did MPAA
21 ask you to review the written rebuttal testimony
22 of Raul Galaz filed on March 27th and the related

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1 exhibits to the testimony?

2 A Yes.

3 Q Did you complete that review?

4 A I did.

5 Q Did you find any portion of Mr.

6 Galaz's written testimony that was relevant to

7 CDC?

8 A Yes, I did.

9 Q Can you describe that portion?

10 A There was one exhibit, I believe, 150

11 that did a comparative analysis of the IPG

12 compiled satellite data versus the Cable Data

13 data.

14 Q So could you please turn to IPG

15 Exhibit 150, and that is in the, not the orange

16 binder but one of those other binders there, and

17 if you need help I'll ask to approach.

18 A Yes, I have it.

19 Q Okay. You have IPG Exhibit 150?

20 A Yes, I do.

21 Q So is this the analysis of,

22 comparative analysis of CDC satellite data and --

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1 versus IPG's data analysis that you were

2 referencing?

3 A Yes.

4 Q So did you review IPG Exhibit 150?

5 A Yes, I did.

6 Q Did you find any errors in IPG Exhibit

7 150 that were made by IPG?

8 A I did.

9 Q What kinds of errors did you find in

10 IPG Exhibit 150?

11 A Generally, I could probably categorize

12 the types of errors into three categories, one --

13 Q What are those categories?

14 A One would be missing statements of

15 account, statements of account that were not

16 included in their exhibit, in the analysis at

17 all, and Cable Data data.

18 Q What's the second category?

19 A Pardon?

20 Q What is the second category of error?

21 A General typos and omissions.

22 Q And what's the third category of error

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1 you noticed?

2 A I would categorize the third as non-

3 errors. They're explanations of the

4 discrepancies, with differences in the

5 methodology in compiling the data.

6 Q So methodological -- differences in

7 methodology in compiling the data?

8 A Correct.

9 Q All right, so how did you determine

10 that IPG made these errors you just talked about,

11 or error/non-errors in IPG Exhibit 150?

12 A Well, when I was reading it I could

13 see that the list of discrepancies was summarized

14 but it didn't -- obviously, I would have a very

15 serious curiosity as to whether it was something

16 that was going by CDC or if it was IPG, because

17 as, on behalf of my clients I would want to know

18 if it's something that I needed to correct, and

19 if so, allow the opportunity to do so.

20 Q So what did you do to determine if it

21 was right or wrong?

22 A I actually compared their Exhibit 150

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1 with the Cable Data data, as well as the original

2 statements of accounts for the satellite islands,

3 the originals.

4 Q The originals meaning the documents

5 that were filed with the Licensing Division at

6 the Copyright Office?

7 A That is correct.

8 Q Okay. So let's talk about the first

9 category of error you mentioned a minute ago,

10 which I believe was missing statement of

11 accounts. So what do you mean by that?

12 A Well, I happened to notice that when

13 I was comparing and contrasting the numbers, IPG

14 showed the differences in subscriber instances,

15 and I started to break it down by filing. And I

16 identified that in their Exhibit 150 they did not

17 include Galaxy Latin America, DirecTV Latin

18 America and DirecTV in -- well, Galaxy Latin

19 America in '99, DirecTV Latin America in 2000,

20 2001, 2002, and then they were missing DirecTV, I

21 believe, the second half of 2003.

22 Q And how do you know that they are not

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1 included in IPG Exhibit 150, these specific
2 statements of account you just mentioned?

3 A Well, if you look at the first
4 section, 1999, you can see that they --

5 Q So you're in IPG Exhibit 150 now?

6 A I am. And if you look at 1999, across
7 the top of the exhibit --

8 Q Wait, 99, now where are you looking to
9 find 99?

10 A Okay. There's not a page number, but
11 the first page after the summary, the -- it looks
12 like these are organized by year, and 1999 is in
13 the central bottom for their -- of the page.

14 Q Oh I see, and that is a -- so it's a
15 landscape type of page, which you're looking here
16 on the bottom for the year 1999, as in the middle
17 of the landscape?

18 A That's correct.

19 Q All right. So, and also, where are
20 you looking?

21 A So across the top they list the actual
22 companies that have filed in that data year, and

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1 A And then in 2003, they are missing,
2 well Direct -- the second half of DirecTV -- oh
3 no, I'm sorry.

4 MR. BOYDSTON: Your Honor, if I may,
5 I'd like to object, because I'd like to conduct a
6 voir dire as to whether or not there's some sort
7 of a report. This is somewhat detailed, and if
8 there's not a report, that's fine, but I'd like
9 to know if there's a written report. This is
10 fairly detailed information that we haven't been
11 given until we're hearing it now.

12 JUDGE BARNETT: No voir dire is
13 necessary. This witness is talking about your
14 exhibit, Mr. Boydston.

15 MR. BOYDSTON: I know, but she's
16 clearly conducted an analysis of it that is
17 somewhat detailed, and I don't know if that
18 exists in some form that we can have other than
19 just hearing it orally.

20 JUDGE BARNETT: Well, you can make
21 notes --

22 MR. BOYDSTON: But normally --

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1 I noticed that Galaxy Latin America was not
2 included in 1999. And that is basically the same
3 company, but in 2000 it doesn't occur as DirecTV
4 Latin America.

5 Q So you're saying you do not see
6 DirecTV Latin America listed in the top header?

7 A Top header of the, for years 2000.

8 Q For year 2000 in IPG Exhibit 150?

9 A Yes, both halves, so it would be both
10 halves for those filings, also the same in 2001.
11 It is missing DirecTV Latin America, first and
12 second half. In 2002 it's missing DirecTV Latin
13 America, first and second half. And in 2003,
14 let's see -- oh wait, 2002 there are some but
15 it's missing the first half, actually.

16 Q 2002 or 2003, you're mentioning now?

17 A 2002 is the first half of DirecTV
18 Latin America only.

19 Q 2002 you're missing, the first half of
20 DirecTV Latin America is missing?

21 A Correct.

22 Q Okay.

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1 JUDGE BARNETT: -- the way we do. No,
2 overruled. Go ahead, Ms. Plovnick.

3 THE WITNESS: So in, and I believe in
4 2003 they used --

5 BY MS. PLOVNICK:

6 Q So 2003, is there a missing SOA error,
7 or is it not apparent?

8 A It's less apparent in the other years,
9 but I think they used the first half or the
10 second half, so the differences in those records,
11 which is -- if you're missing a filing, that's
12 not necessarily a bad thing but it would make the
13 differences smaller than if you're missing a
14 filing entirely.

15 Q So does the CDC data that you provided
16 to MPAA and SDC in this proceeding capture these
17 SOAs you just mentioned that are not included in
18 IPG Exhibit 150?

19 A Yes.

20 Q All right. So let's talk about the
21 second category of error, of IPG error you
22 mentioned which you said is a data entry error.

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1 What do you mean by that?

2 A Well these are common. There are no
3 perfect data sets in the world, but these are
4 common, maybe typo, missing digit, perhaps the
5 subscribers of a given station is completely
6 missing from the report, basic human error, typo.

7 Q So can you point me to an example of
8 a data entry error in IPG Exhibit 150?

9 A Yes, actually, if you turn to the --
10 let me find it here, 2005. This is one that just
11 popped out at me, but in the 2005 summary --

12 Q Okay, so you're on the page that has
13 2005 at the bottom, in the bottom of the
14 landscape?

15 A Yes, but --

16 Q And it's the first 2005 page?

17 A Yes.

18 Q Hold on for a second, it's the first
19 one?

20 A Yes. On the first of the two pages,
21 if you go down to WAU, it's about three quarters
22 of the way, you'll see that DirectTV first half

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1 Q Okay. So just, Ms. Martin, did I
2 accurately describe this? I was doing it very
3 quickly as I was approaching you. What is this
4 document?

5 A This is the currently filed document
6 by DirectTV in the first half of 2005.

7 Q Okay. And where should we look to see
8 this data entry error that you were talking about
9 on it?

10 A If you look on the very back page,
11 where the subscriber numbers are detailed on a
12 month-by-month basis, if you look in the far
13 right column in, for WAU, which is about two
14 thirds of the way down the page.

15 Q Yes.

16 A You'll see that WAU is listed as the
17 call sign, and all the way to the right is the
18 total for the six months, and that's 1,212,112.

19 Q And if we compare that to IPG Exhibit
20 150, they're not the same, are they, for 2005?

21 A That is correct. They have 121,000.

22 Q Okay. How much is IPG off by, for

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1 has 121,000, and it should have been 1.2 million.

2 Q It should have been 1.2 million?

3 A 1.212 million, I think. I don't
4 recall the exact number but --

5 Q Would you be able to recall the exact
6 number if you looked at the relevant statement of
7 account for that accounting period?

8 A Definitely.

9 MS. PLOVNICK: May I approach and show
10 Ms. Martin the statement of account?

11 JUDGE BARNETT: You may.

12 MS. PLOVNICK: I have copies if anyone
13 else would like to see, but now, let the record
14 show I am showing Ms. Martin the statement of
15 account filed in the Licensing Division on July
16 29th, 2005, for the first accounting period, it
17 looks for 2005, for DirectTV, Incorporated. Yes?
18 And we have a copy of it here. Let me hand you a
19 copy of the account statement so you can see what
20 the witness is looking at. May I approach?

21 JUDGE BARNETT: Yes.

22 BY MS. PLOVNICK:

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1 2005?

2 A About a million.

3 Q By about a million?

4 A Subscriber instances, yes.

5 Q By about a million subscriber
6 instances? Now is this the only data error that,
7 data entry type error that you found in examining
8 IPG Exhibit 150?

9 A No. There were several.

10 JUDGE STRICKLER: When you -- I'm
11 sorry, when you say several, how many?

12 THE WITNESS: Across all years or just
13 by year?

14 JUDGE STRICKLER: Let's do the first
15 way by all years.

16 THE WITNESS: There was at least 40
17 across all the years.

18 JUDGE STRICKLER: Thank you.

19 BY MS. PLOVNICK:

20 Q All right. So let's talk about the
21 third type of error you mentioned, which are
22 methodological differences, which and you said

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1 that's really not an error, as I -- you called it
2 a non-error. Can you explain you mean by the
3 non error or the methodological difference
4 terminology?

5 A Yes. This was just an explanation of
6 the discrepancy. And actually there's an -- I
7 can explain it maybe with an example.

8 Q Sure. If you have an example, that
9 would be terrific.

10 A What happens, starting in 2005,
11 DirectTV in particular was required to report all
12 feeds of a given broadcast station. So what it
13 became common for DirectTV, for example, to report
14 two records for say, WABC. So, and actually on
15 the same page that we were just looking at, there
16 are two entries for WABC. And while --

17 Q So you're looking at the -- this is
18 the 2005 one, DirectTV SOA? And the last page,
19 and you're noticing that there are two entries
20 for WABC, one at the top of the page, and one --

21 A Yes, and one just about four or five
22 down, below the WAU call sign we were just

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1 looking at.

2 Q It says WABC with a subscript 1, is
3 that what you're referencing?

4 A That is correct.

5 Q All right. So how would CDC tabulate
6 that type of data on an SOA?

7 A Well it's important to note that back
8 in 2005 the digital feeds were just starting to
9 emerge, okay, and we didn't know for sure at that
10 time, we didn't know whether or not that at the
11 time, we didn't know if maybe the programming
12 might be different.

13 And say, WABC at the top, which was
14 presumably at that time analog, and we saw the
15 subscript 1 to the net as possibly the digital
16 feed, which may or may not have the same
17 programming. So we reported them separately.

18 Q So you would input that data as two
19 separate stations?

20 A Yes.

21 Q How would you, what would you call
22 them in your data, the same, by the same call

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1 sign or a different terminology?

2 A Well, we would actually report one as
3 WABC in this case, and the other one as WABC 1 or
4 DT, like the digital. We tried to be consistent
5 about that because if we ever needed to go back
6 we'd be able to track where that program, that
7 feed came from.

8 And I did find a couple of examples
9 where my staff did add them together. But the --
10 so we would, for the most part, our protocol was
11 to report them in our database as two separate
12 records.

13 Q You would report them the same way
14 that DirectTV reported them, as two separate
15 records?

16 A Correct.

17 Q So does -- in Mr. Galaz's analysis,
18 which is IPG Exhibit 150, did they also report
19 them as two separate stations in this kind of a
20 situation?

21 A No, they would aggregate them and
22 report them as one.

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1 Q So, which way is correct, in your
2 opinion, to report this?

3 A Honestly, I really think that both are
4 okay. I think that the reason we did it back
5 when, you know, we were compiling these data, is
6 to correctly and accurately represent the way
7 it's reported. I'm partial to this way only
8 because it's trackable, and its transparency back
9 to the statement of account is important to me.

10 Q So Ms. Martin, if you flip to the
11 first page of IPG Exhibit 150, there is a summary
12 on that page.

13 A First page of IPG Exhibit 150? Oh, on
14 the exhibit?

15 Q Yes.

16 A On IPG Exhibit.

17 Q Does this methodological discrepancy
18 that we've been discussing, does that affect the
19 summary that is listed here? Does it have an
20 impact on it?

21 A It does, actually. I'm glad you
22 mentioned it. Actually, that's exactly why I

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1 categorized that third error, because what would
2 happen in this case is that if you were to sort
3 in descending order the top 20 or top 30 feeds,
4 you can see that WABC has 4.9 million subscriber
5 instances, and WABC subscript 1 has 300 and what
6 is it, 82,573? So sorting it descending, our DT
7 feed would drop out of the top 20 or 30.

8 And if they added it together, it
9 clearly would not match our total for WABC alone.
10 But when I actually tried to reconcile, that
11 difference was accounted for by that DT feed
12 that's later on the page. So a lot of those
13 differences in his exhibit were accounted for in
14 that second feed that we recorded separately.

15 Q So if you sort through the top 20 or
16 top 30 stations in the way that Mr. Galaz did in
17 this exhibit, it makes it appear that there's a
18 big discrepancy that doesn't exist if you account
19 for these separate feeds that are reported --

20 A Right.

21 Q - separately in the CDC data?

22 A Right. Factoring them with the

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1 JUDGE BARNETT: And thank you for your
2 understanding. This statement of account, I
3 don't think you gave it an exhibit number and we
4 should do so.

5 MS. PLOVNICK: Okay.

6 JUDGE BARNETT: So you can take care
7 of that first thing in the morning.

8 MS. PLOVNICK: I certainly will. I
9 will give this one a number.

10 JUDGE BARNETT: Thank you.

11 MS. PLOVNICK: Thank you.

12 JUDGE BARNETT: We're at recess until
13 9 o'clock. That will be a.m. tomorrow.

14 (Whereupon, the above-entitled matter
15 went off the record at 4:27 p.m.)
16
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1 protocol differences, and we added that back in
2 they would match.

3 Q So do you know how much -- what kind
4 of an impact does that have on these percentages
5 here, if you know?

6 A Well there were a couple of years
7 where those kinds of discrepancies accounted for
8 80 percent of the discrepancies.

9 Q Thanks, Ms. Martin. Now let me direct
10 your attention to the --

11 JUDGE BARNETT: Ms. Plovnick, I'm very
12 sorry, but both Ms. Whittle and I have off-
13 premises appointments so we have to leave.

14 MS. PLOVNICK: Understood, Your Honor.

15 JUDGE BARNETT: It's the end of the
16 day, and I'm sorry, Ms. Martin, we'll have to
17 bring you back, but that's --

18 MS. PLOVNICK: Okay. And I --

19 JUDGE BARNETT: It's the end of the
20 day.

21 MS. PLOVNICK: I don't have too much
22 more but I certainly understand, Your Honor.

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